IN THE SUPREME COURT OF FLORIDA

DANIEL JON PETERKA,

Appellant,

CASE NO. SC02-1410

v.

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, DANIEL JON PETERKA, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The trial court's order denying postconviction relief will be referred to as Order followed by the page number. (Order at *). The transcripts of the evidentiary hearing will be referred to as EH followed by the volume and page. (EH VOL. PAGE). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court's denial of a motion for post-conviction relief following an evidentiary hearing. The facts of the crime, as stated in the direct appeal opinion, are:

> The evidence at trial revealed that on February 11, 1989, Daniel Peterka was to surrender himself to authorities in Nebraska to begin serving two consecutive one-year prison terms for theft. Peterka met with his girlfriend, Cindy Rush, and told her that he did not want to go to jail, that he wanted to get a job and establish himself somewhere else. After arguing with Rush, Peterka walked away.
>
> Peterka reappeared in Niceville, Florida, at the end of February 1989, and eventually moved in with Ronald LeCompte, a man Peterka had met at work. Shortly thereafter, Peterka explained that he did not have any identification, and asked LeCompte to sign for the purchase of a .357 magnum handgun. LeCompte signed as a favor to Peterka.
>
> Sometime in April 1989, Peterka moved into a rental duplex with John Russell, the victim in this case. According to Russell's cousin, Deborah Trently, Peterka and Russell did not have a good relationship. Connie LeCompte, a friend of Peterka's, testified that Peterka told her that "if everything went like he wanted it to, he was going to be moving back up North."
>
> On June 27, 1989, Peterka went to the motor vehicle department and applied for and received a duplicate driver's license in the name of John Russell. The license contained Peterka's picture and Russell's name. On that same day, Peterka cashed a three-hundred-dollar money order that was payable to Russell and had been mailed to Russell by a relative. Russell became concerned when he did not receive the money order in the mail. He obtained a photocopy of the money order from his relative and told his cousin Deborah Trently that he suspected that Peterka had stolen the money order. Further, Russell stated that he did not intend to confront Peterka about the money order until the gun was out of the house and that he would let the police handle the matter. On July 11, 1989, Russell contacted Kimberly Cox, an employee at Vanguard Bank, about his money order. Russell showed Cox a photocopy of the money order and stated that he had not endorsed the back of the money order. Russell told Cox that he thought that his roommate had cashed the money order. Cox testified that she told Russell that a formal prosecution for forgery could not begin until the bank received the original money order. Cox further testified that Russell stated that he did not intend to bring up the matter with his roommate and that he would let the police

handle the situation. Finally, Lori Slotkin, Russell's girlfriend, testified that on the night of July 11, 1989, Russell told her that he was waiting for the bank to obtain the original money order so that he could bring charges against Peterka. Slotkin also testified that Russell stated that he did not intend to confront Peterka because he was nervous about the gun.

Slotkin testified that she last saw Russell at 2:30 a.m. on July 12, 1989. Frances Thompson, Peterka's girlfriend, testified that on the morning of July 12, 1989, Russell helped her move her belongings out of the duplex. Thompson also testified that at 8:30 p.m. on July 12, 1989, Peterka came by her work, driving Russell's car. Peterka and Thompson went out to dinner and drove to the beach in Russell's car. At dinner, Peterka told Thompson that he was a fugitive from Nebraska and he talked about "not wanting to go to prison." Afterwards they returned to the duplex. Thompson spent the night at the duplex and went to work the next morning.

Russell's friend and co-worker, Gary Johnson, became worried when Russell did not show up for work on July 13, 1989, which was a payday. Johnson drove over to the duplex around 9 a.m. and saw Russell's car parked in the driveway. When no one answered the door, Johnson climbed through a window. Once inside the duplex, Johnson saw Russell's car keys, cigarettes, and lighter on a table. Johnson also noted that three of the cushions from the couch were missing. Johnson then looked in Peterka's bureau for the gun. He found it unloaded, with six live shells lying beside it. Johnson left the house and returned to work. After work, Johnson returned to the duplex and asked Peterka where Russell was or when Russell had left. Peterka stated that he did not know Russell's whereabouts. After Johnson left the duplex, Kevin Trently, the husband of Russell's cousin, came over to inquire about Russell. Peterka told Trently that Russell had left with someone the previous night.

Johnson filed a missing person report with the Okaloosa County Sheriff's Office that night. Deputy Harkins went to the duplex around 8 p.m., accompanied by Johnson and two others. Peterka was at the duplex with Thompson. Peterka told Harkins that Russell had left the previous day with "some long-haired guy." When Harkins asked Peterka for identification, Peterka told him that he had lost his driver's license, but gave him a birth certificate. After Harkins and the others left, Thompson asked Peterka if he knew Russell's whereabouts. Peterka indicated that he did not.

Harkins ran Peterka's name and birth date in the sheriff's office's computer. The computer check indicated that Peterka was a fugitive from Nebraska with an outstanding warrant against him and that he was considered "armed and dangerous." After receiving verification of the computer check, Harkins and other deputies arrested

Peterka around 1:30 a.m. the next morning. The deputies searched the duplex and found the gun. Peterka showed the police the bill of sale for the gun and convinced them that it belonged to a friend. The deputies did not seize the gun. The deputies also found Peterka's wallet, containing the driver's license with Peterka's picture and Russell's name, other items of identification belonging to Russell, $407, a newspaper clipping advertising jobs in Alaska, and Peterka's Nebraska driver's license.

At approximately 7 a.m. on July 14, 1989, Peterka was transferred to the county jail. Peterka telephoned Thompson and asked her to remove some of his belongings from the duplex and to save them. Thompson offered to remove the gun from the duplex and to keep it for Peterka. While in the duplex, Thompson noticed that some of the couch cushions were outside. She also discovered a shovel in the trunk of the victim's car. After Thompson called the sheriff's department and told them what she had found, several law enforcement officers searched the duplex. "Shorty" Purvis, the owner of the duplex and Peterka's employer, gave law enforcement Peterka's handgun, which he had obtained from Thompson. The police search revealed blood stains on the couch where the cushions had been and on the carpet under the couch. A search of the trunk of the victim's car revealed a shovel, some sand, blood stains on the tail lights, and blood inside the trunk.

On July 18, 1989, Peterka called Purvis and asked him to come to the jail. Peterka told Purvis that he had accidentally killed Russell during a fight over the money order. When Purvis replied that he would tell the police everything that Peterka said, Peterka agreed. At Peterka's urging, Purvis summoned Deputy Atkins, who advised Peterka of his rights.

Peterka's statement to the police recounted the following events: Peterka forged Russell's signature and cashed the money order. He paid Russell one hundred dollars to use Russell's identification. Russell instigated a shoving match over the money order that escalated into a fight in the living room of the duplex. Both men reached for Peterka's gun, but Peterka got it first. As Russell got up from the couch, the weapon accidentally fired and the bullet entered the top of Russell's head. Russell fell down on the couch. Peterka wrapped Russell's body in a rug, drove to a remote part of Eglin Air Force Base, and buried the body in a shallow grave. After giving this statement, Peterka agreed to take law enforcement to the body. Upon his return to the sheriff's office, Peterka agreed to give a videotaped statement, which was similar to the statements that he had given earlier. The trial court admitted this videotaped statement into evidence.

Peterka v. State, 640 So.2d 59, 62-64 (Fla. 1994).

> The jury found Peterka guilty of first-degree murder and recommended death by a vote of eight to four. The trial court found that the following aggravating circumstances applied to the homicide: 1) committed while under a sentence of imprisonment; 2) committed for the purpose of avoiding or preventing a lawful arrest; 3) committed for pecuniary gain; 4) committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; and 5) committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. In mitigation, the trial court found that Peterka had no significant history of prior criminal activity. The trial court stated that it did not find any nonstatutory mitigating circumstances. After weighing the aggravating and mitigating circumstances, the trial court followed the jury's recommendation and sentenced Peterka to death.

Peterka, 640 So.2d at 65 (footnotes omitted).

Peterka appealed to the Florida Supreme Court, raising twelve issues: 1) excusing for cause prospective juror Piccorossi because of his personal opposition to the death penalty; 2) denying Peterka's motion to suppress his statements to the police; 3) denying Peterka's motion for judgment of acquittal based upon insufficient evidence of premeditation; 4) admitting hearsay evidence that Peterka had fled Nebraska and was considered "armed and dangerous"; 5) admitting testimony that the victim suspected Peterka of stealing the money order and that the victim intended to let the police handle the matter; 6) admitting into evidence a photograph of the victim's skull; 7) entering a sentencing order that lacked clarity; 8) finding the aggravating factor that the homicide was committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws; 9) finding that the murder was committed for pecuniary gain; 10) referring to other "mitigating circumstances" in the sentencing order without stating what they

were or why they did not amount to mitigation as required by *Campbell v. State*, 571 So.2d 415 (Fla.1990); 11) allowing the state, during cross-examination of Peterka's mother at the penalty phase, to allege that Peterka had an extensive juvenile record; and 12) partially denying Peterka's motion to suppress his statements because he repeatedly asked for assistance of counsel, which law enforcement ignored. *Peterka*, 640 So.2d at 65. The Florida Supreme Court affirmed the conviction and sentence.

Peterka filed a petition for writ of certiorari arguing that the trial court's sentencing order did not set forth sufficient facts to support its findings regarding the aggravating circumstances and the Florida Supreme Court's harmless error analysis after it struck the pecuniary gain aggravating circumstance and merged two other aggravating circumstances was inadequate. The United States Supreme Court denied certiorari on January 23, 1995. *Peterka v. Florida*, 513 U.S. 1129, 115 S.Ct. 940, 130 L.Ed.2d 884 (1995).

On March 24, 1997, Peterka filed a motion to vacate judgment of conviction and sentence with request to amend and for evidentiary hearing with numerous attachments. (Vol. I 1-147). The State Attorney's Office filed a response asserting that claims 1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 should be summarily denied. (Vol. II 246-263). On January 21, 1998, the trial court entered an order denying several claims but allowing Peterka to amend his motion to more fully plead his ineffectiveness claim in light of public records

disclosures. (Vol. II 265-269). On July 7, 2000, Peterka filed an Amended Motion to vacate judgment of conviction and sentence. (Vol. II 290-335). On September 25, 2000, Peterka filed a Corrected Amended Motion to vacate judgment of conviction and sentence (Vol. II 340-386). On September 28, 2000, the Attorney General's office filed a response, asserting that claims 1, part of 4, 5 and 6 should be summarily denied but agreeing to an evidentiary hearing on claims 2, 3 and part of 4. (Vol. III 391-411). On February 1, 2001 Peterka filed a second Corrected Amended Motion to vacate judgment of conviction and sentence. (Vol. III 412-462). This second motion was filed with Peterka's consent.

The trial court held a *Huff* hearing on February 1, 2001. (Supp. Vol II 226-246). The trial court granted an evidentiary hearing on claims 1, 2, 3, part of 4, 5. (Supp. Vol II 223-246). The trial court entered a written order following the *Huff* hearing. (Vol. III 463-466). The trial court held an evidentiary hearing on June 28-29, 2001 and July 16, 2001. The defendant testified at the evidentiary hearing. (EH Vol. V 190 - Vol. VI 222). The trial court ordered the parties to submit post-evidentiary memoranda. Peterka filed an initial closing argument on September 5, 2001. (Vol. III 471-505). The Attorney General's Office filed its memo on December 3, 2001. (Vol. III 506-550). Peterka then filed a rebuttal closing argument. (Vol. III 555-568). The trial court entered an order denying all post-conviction relief on May 2, 2002. (PCR Vol. III 569-592). In its order, the trial court noted:

> During the guilt and penalty phase proceedings, the defendant was represented by Mark Harllee, Esq., and Earl Loveless, Esq. Mr. Harllee was second chair and penalty phase counsel, and Mr. Loveless was lead counsel handling the guilt phase of the trial. At the time of this trial, Mr. Harllee had worked on two prior capital cases and, Mr. Loveless had tried six capital cases to conclusion as both lead counsel and penalty phase counsel.

(PCR Vol. III 570).

SUMMARY OF ARGUMENT

ISSUE I

Peterka asserts that his trial counsel was ineffective for presenting a self-defense theory which allowed the State to admit the victim's reputation for peacefulness. Peterka also asserts that trial counsel was ineffective for presenting an accident defense which allowed the State to admit the victim's fear regarding the defendant and his gun. The State respectfully disagrees. Collateral counsel is basically asserting that trial counsel was ineffective for failing to concede to second degree murder. Collateral counsel posits that trial counsel should have merely negated any premeditation. This is the equivalent to conceding to second degree murder. Trial counsel, rather than conceding to second degree murder, presented a combination accident/self-defense theory in the hope of an acquittal and then argued for an acquittal or, at most, manslaughter. Thus, the trial court properly found counsel was not ineffective.

ISSUE II

Peterka contends that his trial counsel was ineffective for failing to inform him of his right to testify during the guilt phase. After an evidentiary hearing exploring this issue, the trial court found the testimony of lead trial counsel that he did inform Peterka of his right to testify to be credible. This is a finding of fact that counsel was not deficient. Furthermore, there is no prejudice. The jury heard Peterka explain his version of the events in his videotaped confession.

His testimony at the guilt phase would have been merely cumulative of his statements on the tape. Thus, there is no prejudice. The trial court properly denied this claim of ineffectiveness.

ISSUE III

Peterka asserts that his trial counsel was ineffective for failing to present mitigating evidence of his service in the National Guard and good conduct in jail at the penalty phase. Most of the mitigating evidence, such as his relationships with his family, prior peaceful behavior within his family and prior good deeds, was, in fact, presented to the jury during penalty phase. The National Guard service was mentioned at the penalty phase but counsel made a tactical decision not to focus on his military service because Peterka had committed a crime leading to his discharge while he was in the National Guard. As counsel testified at the evidentiary hearing, he was dealing with a jury from a military area which would view committing a crime while in the service as besmirching the military. The model inmate evidence was not available to counsel because the escape occurred after the penalty phase. Nor was counsel ineffective for failing to present the escape to the judge. Peterka never informed counsel of the escape. Thus, the trial court properly denied this ineffectiveness claim following the evidentiary hearing.

ISSUE IV

Peterka asserts that trial counsel was ineffective during jury selection when he failed to challenge prospective jurors for cause. The State respectfully disagrees. There is no deficient performance. None of the "for cause" challenges would have been granted and counsel is not ineffective for recognizing this. Nor is there any prejudice. Peterka was tried by a fair and impartial jury. Therefore, the trial court properly denied this claim of ineffectiveness following the evidentiary hearing.

ISSUE V

Peterka next asserts that the trial court improperly limited evidence at the evidentiary hearing. Part of this evidence was cumulative. It had already been presented at trial. Evidentiary hearings are designed to elicit new evidence not presented at trial. The brother was not qualified to testify as to the meaning of Peterka's military commendation. Peterka testified as to its meaning at the evidentiary hearing. Moreover, as the trial court noted, the military commendation speaks for itself. Thus, the trial court properly limited the evidence at the evidentiary hearing.

ISSUE VI

Peterka asserts his collateral counsel was ineffective during post-conviction litigation due to lack of communication and for failing to present certain evidence at the evidentiary hearing. He asserts on appeal that his attorney had a conflict of interest because he had filed a bar complaint against collateral

counsel. There is no right to effective assistance of collateral counsel. Nor is there any right to conflict-free collateral counsel. Furthermore, lack of communication is not a conflict of interest. Nor does filing a bar complaint create an actual conflict. Conflict of interest is a legal term of art limited solely to situations involving multiple clients. Furthermore, Peterka waived any right he had to conflict-free collateral counsel. Thus, the trial court properly handled collateral counsel's motion to withdraw and Peterka's request to dismiss collateral counsel.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE CLAIM OF INEFFECTIVENESS AT GUILT PHASE FOR PRESENTING A SELF-DEFENSE THEORY? (Restated)

Peterka asserts that his trial counsel was ineffective for presenting a self-defense theory which allowed the State to admit the victim's reputation for peacefulness. Peterka also asserts that trial counsel was ineffective for presenting an accident defense which allowed the State to admit the victim's fear regarding the defendant and his gun. The State respectfully disagrees. Collateral counsel is basically asserting that trial counsel was ineffective for failing to concede to second degree murder. Collateral counsel posits that trial counsel should have merely negated any premeditation. This is the equivalent to conceding to second degree murder. Trial counsel, rather than conceding to second degree murder, presented a combination accident/self-defense theory in the hope of an acquittal and then argued for an acquittal or, at most, manslaughter. Thus, the trial court properly found counsel was not ineffective.

The standard of review

An ineffectiveness claim is reviewed *de novo* but the trial court's factual findings are to be given deference. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001)(recognizing and honoring the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact in the context of an

ineffectiveness claim). Thus, the standard of review is *de novo*.

The trial court's ruling

According to the trial court:

> The record conclusively demonstrates that trial counsel argued a coherent theory of self-defense,[1] which as testified to by trial counsel during the evidentiary hearing was the theory that the defense was relying on in the trial.[2]

(PCR Vol. III 582)(footnotes included but renumbered).

Trial

Peterka's defense at trial, as characterized by this Court, was ". . . Peterka asserted that he accidentally shot the victim during a fight instigated by the victim." *Peterka*, 640 So.2d at 69.

Evidentiary hearing

At the evidentiary hearing, trial counsel, Public Defender Earl Loveless, testified that their theory of defense was self-defense. (EH Vol. VI 382). The basic defense was that it was an accidental shooting during the course of the struggle for the gun. (EH Vol. VI 382). This theory was consistent with what the medical examiner was likely to testify to at trial and

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[1] Trial transcript, P. 1760-1773; 1801-1815.

[2] Evidentiary hearing transcript, Vol. II, P. 380-398.

inconsistent with the prosecutor's case. (EH Vol. VI 380-381). While a true accident defense might have led to a not guilty verdict, defense counsel did not think under the circumstances that the jury would believe a true accident defense. (EH Vol. VI 382). By presenting self-defense, he was entitled to a justifiable use of deadly force jury instruction. (EH Vol. VI 383). In trial counsel's opinion, the best outcome, that was a realistic option, would have been manslaughter. (EH Vol. VI 396). Excusable or justifiable homicide was not a realistic option. (EH Vol. VI 396). Self-defense was the only viable theory. (EH Vol. VI 396). According to trial counsel, a statement that during a struggle they both went for the gun, presents only two possible defenses: an accidental shooting or a reaction amounting to self-defense. (EH Vol. VI 397). Trial counsel thought it unlikely that the jury would agree with the self-defense theory which would have resulted in a not guilty verdict; rather, counsel was hoping for the more realistic result of guilty of manslaughter. (EH Vol. VI 397-398). Trial counsel acknowledged that the victim's state of mind became admissible as a result of the defense that was presented. (EH VII 412).

Merits

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the

defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Cf. *Spencer v. State*, 28 Fla. L. Weekly S35, (Fla. 2003)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The *Strickland* standard requires establishment of both prongs. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

Collateral counsel criticizes trial counsel for presenting a self-defense and an accident defense. IB at 41 and 47. Collateral counsel argues presenting self-defense allowed the prosecutor to admit the evidence of the victim’s reputation for peacefulness and presenting the accident defense allowed the prosecutor to admit the victim’s fear regarding the defendant and his gun. In her view, neither defense should have been presented. Rather, a defense that he killed the victim “without consciously deciding to do so” or that he “fired the weapon suddenly without thinking” should have been the only defenses presented. IB at 47. However, a “without consciously deciding to do so” defense is not a legally recognized defense. Or rather, it is a second degree murder defense. This defense

merely negates premeditation. Collateral counsel's alternative amounts to conceding to second degree murder. IB at 48. While presenting a self-defense/accident defense did, indeed, permit the State to admit certain evidence, trial counsel is not ineffective for viewing these defenses, which may have led to an acquittal, as better than simply conceding to second degree murder.

Every effort must be made to eliminate the "distorting effects of hindsight" and to evaluate the conduct from counsel's perspective at the time of trial. ***Fennie v. State***, 28 Fla. L. Weekly S619 (Fla. July 11, 2003)(quoting ***Strickland***, 466 U.S. at 689). The reason collateral counsel thinks that conceding to second degree murder would have been better than presenting an accident defense is that presenting an accident defense did not work and Peterka was convicted of first degree murder. Once a defendant is convicted of first degree murder it becomes obvious that arguing for second degree murder was the best defense counsel could have realistically hoped for, but trial counsel has no means of knowing that at the time of trial. Presenting an accident/self-defense theory and arguing for manslaughter is not something no reasonable trial attorney would have done. Indeed, here, two attorneys agreed this was the best option. Peterka had two attorneys in this case. Guilt phase counsel, was a seasoned public defender, who had tried six prior capital cases to conclusion. Penalty phase counsel, while new to the felony division, had worked on two prior capital cases by the

time of trial.[3] Two reasonable attorneys could and did present this defense rather than conceding second degree murder. *Waters v. Thomas*, 46 F.3d 1506, 1518 (11th Cir 1995)(noting that the test is whether some reasonable attorney could have acted, in the circumstances, as these two did.).

Nor was trial counsel ineffective for presenting a combination self-defense/accidental shooting defense rather than a pure accident defense. Peterka's own videotaped confession was a combination of self-defense and accident. Peterka's claim, that he fired the gun while he and Mr. Russell were wrestling or struggling with each other, is a self-defense theory. IB at 42. Peterka's claim that he fired the gun when he was startled by the victim is the same thing as an accident defense. IB at 48. Collateral counsel states that Peterka did not shoot the victim "out of fear" but, rather, because he was "startled". IB at 48. One is just a minor version of the other. A pure accident defense does not account for the statements that they both started "grabbing" for the gun and were "struggling for the gun" in Peterka's confession. A pure accident defense would be that they were friends who were merely talking while Peterka was cleaning the gun and it just went off. Peterka stated that he had finished working on the gun and the gun was on the coffee table. Peterka admitted that they were arguing about the money and the argument had escalated into a physical struggle. This aspect of the confession had to be accounted for and the only

[3] In one of the two cases, the jury returned a second degree verdict and in the other, the end result was a life sentence. (EH VI 226, 255-257).

recognized legal defense that matches this set of facts is self-defense. Moreover, any recognized legal defense must match the confession. Trial counsel had no choice but to present a combination self-defense/accidental shooting defense because Peterka's own confession was a combination self-defense/accidental shooting.

Peterka's reliance on *Hopson v. State*, 168 So.2d 810 (Fla. 1936) is misplaced. *Hopson* held that where a gun went off during a struggle, the evidence supports an accident theory, not a self-defense theory. However, *Hopson* was not an ineffectiveness case. Collateral counsel is basically claiming that trial counsel should have never been allowed to present a self-defense theory. Regardless of whether counsel was entitled to a self-defense instruction, he got one. Trial counsel cannot be ineffective for obtaining an additional defense which he was not entitled to present under the caselaw. Pulling a fast one on the prosecutor is not ineffectiveness; rather, it is the height of ineffectiveness. Nor can there be any prejudice. Additional defenses do not hurt a defendant. Thus, the trial court properly found that the defense trial counsel presented at trial was a coherent theory and trial counsel was not ineffective.

Collateral counsel also argues that trial counsel was ineffective for relying on the state's expert, the medical examiner, to support Peterka's defense rather than obtaining their own medical expert. IB at 49. The trial court ruled:

> Claim C(2)(g) through (j) argues that trial counsel did not independently investigate the opinion of former

Okaloosa County Medical Examiner, Dr. Kielman, as to the deceased's gunshot wound being a contact wound and that trial counsel rendered ineffective assistance of counsel by failing to effectively cross examine the medical examiner, which was prejudicial and inconsistent with Mr. Peterka's version of how the shooting occurred thus denying Mr. Peterka of a reliable adversarial testimony. To support his claim on this issue, the Defendant called expert witness, Dr. Cohen, to show that he could identify exit wounds to the skull that would have contradicted Dr. Kielman's opinion concerning the exit wound and trajectory of the bullet. The Court finds that the testimony of Dr. Cohen is not credible and completely rejects his opinion and testimony.

Dr. Kielman had testified during the trial regarding the exit wound and trajectory of the bullet. The victim's skull was assembled and used by Dr. Kielman to formulate his opinion and conclusions regarding the method and manner of death. The Court finds that the condition of the skull at the time of the evidentiary hearing was different than the condition of the skull at the time of trial. The skull had been kept in a container, which had bone fragments in the bottom of the container consistent with the skull being crushed while in the container post-trial. The Defendant's postconviction expert, Dr. Cohen, examined the skull in this condition and testified that the could identify exit wounds to the skull that contradicted Dr. Kielman's opinion. Dr. Cohen examined the skull after it had been crushed, but failed to thoroughly examine the skull and the fragments that were inside the skull's container. Dr. Michael Berkland, Okaloosa County Medical Examiner, was called by the state as a witness during the evidentiary hearing to examine the skull. Dr. Berkland did examine the skull and the skull fragments and was able to piece the skull back together, and then testified regarding the "exit wounds" identified by Dr. Cohen. The "exit wounds" identified by Dr. Cohen were actually the result of the post-trial crushing of the skull.

Furthermore, Dr. Berkland opined that the victim in this case was shot while in a reclining position and that the crime scene, condition of the body, and the blood evidence were all consistent with the state's theory of the case.[4] Dr. Berkland concluded that the gunshot wound was a contact wound, which is the same conclusion Dr. Kielman testified to at trial.[5] Accordingly, the Court rejects Dr. Cohen's opinion and testimony.

Moreover, the Defendant's trial counsel testified that Dr. Kielman's trial testimony was consistent with the

[4] Evidentiary hearing transcript, Vol. III, P. 458-474.

[5] Evidentiary hearing transcript, Vol. III, P. 473-474.

> defense theory of the case. Dr. Kielman's opinion that the exit wound was at the hole in the base of the skull making the trajectory of the bullet straight down was consistent with the Defendant's statement that he shot the victim as the victim came off of the couch with his head pointed at him. Thus, Mr. Loveless made a reasoned tactical decision not to call an additional expert and did not render ineffective assistance of counsel.[6]

(PCR Vol. III 579-581)(footnotes included but renumbered).

First, the trial court "completely" rejected Dr. Cohen's testimony as "not credible". *Porter v. State*, 788 So. 2d 917, 923 (Fla. 2001)(recognizing and honoring a trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact at evidentiary hearing dealing with ineffective assistance of counsel claims). Furthermore, as collateral counsel acknowledges, Dr. Kielman changed his opinion from the deposition to the trial in a manner that supported Peterka's defense. Collateral counsel does explain why it is preferable for trial counsel to present a second medical expert to testify to the exact same thing as the first expert. The State's own expert was sufficient and trial counsel is not ineffective for not presenting cumulative medical evidence. As trial counsel testified at the evidentiary hearing, he was aware that Dr. Kielman was likely to revise his opinion in a manner that supported his defense, which, in fact, the expert did at trial and therefore, there was no need for a second medical expert. *People v. West*, 719 N.E.2d 664 (Ill. 1999)(concluding that there was no ineffectiveness where a second forensic expert would have merely offered cumulative evidence to the State's

[6] Evidentiary hearing transcript, Vol. III, P. 350-357.

medical witness). There can be no deficient performance nor prejudice in such a situation.

Collateral counsel also asserts that trial counsel was ineffective for failing to present evidence of the victim's poor financial situation. IB at 49. The trial court found:

> Claim C(2)(c) asserts ineffective assistance of counsel for failing to investigate and present evidence of the full extent of John Russell's poor financial situation. Mr. Loveless testified during the evidentiary hearing that he was aware of John Russell's poor financial situation but chose not to put on any additional evidence of his financial condition in the defense case. Mr. Loveless made a reasoned tactical decision based on his belief that there had been ample evidence of Mr. Russell's financial situation presented to the jury.[7] Therefore, Mr. Loveless was not ineffective in his representation of Mr. Peterka.

(PCR Vol. III 578)(footnotes included but renumbered).

Guilt phase counsel, PD Loveless, testified at the evidentiary hearing, that while there was "no question" and that it was a "given" that the victim was short of money, highlighting the victim's poor financial situation undermined Peterka's version of events in which Peterka claimed the victim shared the $300.00 check with him. (EH VI 346-347). Trial counsel testified that presenting this evidence "just would have opened up other particular areas there that I just didn't want to get into." (EH VI 347). Trial counsel did not want to present any evidence he did not have to, so he could retain final rebuttal closing argument. (EH VI 347). Counsel felt there was ample evidence that the victim was upset about losing the money already. (EH VI 348).

[7] Evidentiary hearing transcript, Vol. II, P. 346-348.

There was no ineffectiveness. Collateral counsel does not address any of the concerns that trial counsel had about highlighting this evidence. Collateral counsel asserts that had the jury known about the victim's poor financial state, they would have believed that the victim confronted Peterka about the check but this does not necessarily follow. The State's theory was that the victim did not confront Peterka because he was afraid of Peterka and his gun. This fear would have existed regardless of how poor the victim was.

Collateral counsel next argues that trial counsel was ineffective for failing to object to a reference to a right's form. IB at 52-54. The trial court ruled:

> Claim C(2)(e) alleges ineffective assistance of counsel for failing to prevent evidence which had been suppressed from reaching the jury. Mr. Loveless testified that he chose not to have the judge give a curative instruction to the jury because it might call more attention to the statement than needed.[8] Trial counsel's reasoned tactical decision to not have the Court give a curative instruction was not ineffective and there was no resulting prejudice to the Defendant.

(PCR Vol. III 578-579)(footnotes included but renumbered).

The officer's statement referred to a prior *Miranda* rights form that Peterka had signed in connection with a previous statement that had been suppressed. (EH VII 413). Penalty phase counsel did not believe that it was an issue at all. (EH VII 413). Penalty phase counsel testified that the reference was "very innocuous" and he did not feel that it was going to be prejudicial. (EH VII 414). Penalty phase counsel felt that any curative instruction would just call more attention to it and

[8] Evidentiary hearing transcript, Vol. III, P. 413-414.

his only concern was not opening the door to the suppressed statement. (EH VII 414).

Collateral counsel fails to explain why trial counsel's handling of a veiled reference to a rights form was not adequate. She posits no prejudice from the failure to edit. Such ipse dixit assertions are not sufficient.

***NIXON* ISSUE**

In a footnote, collateral counsel asserts that trial counsel's opening statement to the jury violated *Nixon v. Singletary*, 758 So.2d 618, 622 (Fla. 2000) by conceding guilt to the charged crime.

IB at n.3. The State respectfully disagrees. Trial counsel did not concede to the charged crime. He argued for a manslaughter conviction at most. Thus, the trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court ruled:

> Mr. Peterka alleges that he was prejudiced by trial counsel's unauthorized and unreasonable concession of guilt. Mr. Loveless testified during the evidentiary hearing that his intention was not to concede guilt for first degree premeditated murder. Mr. Loveless testified that he was actually trying to emphasize that his position was that the state was not going to be able to prove first degree premeditated murder.[9] In fact, Mr. Loveless' opening statement demonstrates that he did not concede the guilt of the Defendant and that he was trying to emphasize that the state was not going to be able to establish its version of the facts through the evidence; thus, the

[9] Evidentiary hearing transcript, Vol. II, P. 342-343.

> Defendant was not prejudiced by trial counsel's performance.[10]

(PCR Vol. III 577)(footnotes included but renumbered).

Trial

During opening arguments, trial counsel, as part of a theme about holding the State to its beyond a reasonable doubt standard of proof, said: "if those facts are proven, you are going to come back with a verdict of first degree premeditated murder" and "[t]here is no question about it." (T. VI 1122). During closing argument, trial counsel stated "I'm not telling you that Dan Peterka is not guilty, because he killed John Russell." (T. Vol. X 1814). He further stated: "You may find he is guilty of manslaughter, you may find it was accidental or a combination of things" and "[o]ne thing it clearly was not, it was not first degree murder". "You'll sit here all day and all night and you'll find no evidence of first degree murder." (T. Vol. X 1814-1815).

Evidentiary hearing

At the evidentiary hearing, trial counsel testified that he did not believe that he conceded guilt to first degree murder in his opening. (EH VI 342). He said if Mr. Elmore proves all the things he just told you, then my client is guilty of first degree murder, was a big "if" because he did not think the prosecutor would be able to prove them. (EH VI 343).

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[10] Trial transcript, P. 1120-1125, attached hereto as Exhibit "M".

Appellate bar

This entire claim is improper. Collateral counsel may not raise a completely unrelated claim of ineffectiveness in a footnote. Raising a major substantive issue in a footnote is designed to circumvent the page limit. Additionally, this is appellate sandbagging. The State could have easily missed this issue. Furthermore, counsel did not cite *Nixon* or otherwise legally develop this issue. This Court should decline to address such a perfunctorily made claim.[11]

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[11] *Coolen v. State*, 696 So.2d 738, 742 n. 2 (Fla.1997)(refusing to consider an issue raised in a footnote of a brief); *Lawrence v. State*, 831 So.2d 121, 133 (Fla. 2002)(finding issue insufficiently brief where issue was raised in a single sentence); *Shere v. State*, 742 So.2d 215, 217 n. 6 (Fla.1999)(finding issue insufficiently presented for review where appellate counsel did not present any argument or allege on what grounds the trial court erred in denying the claims); *State v. Mitchell*, 719 So. 2d 1245, 1247 (Fla. 1st DCA 1998)(finding that issues raised in appellate brief which contain no argument are deemed abandoned); *Greenwood v. State*, 754 So.2d 158, 160 (Fla. 1st DCA 2000)(declining to address an issue where the appellant addresses the issue in one sentence "followed by a smorgasbord of case citations"); *United States v. Mathis*, 216 F.3d 18 (D.C. Cir. 2000)(declining to address an "asserted but unanalyzed" argument); *United States v. Dawn*, 129 F.3d 878, 881 n.3 (7th Cir. 1997)(declining to address "undeveloped" claim); *United States v. Wiggins*, 104 F.3d 174, 177 n.2 (8th Cir 1977)(failing to specify error or provide supporting authority waives the issue); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)(noting that it is a well settled appellate rule that issues raised in a perfunctory manner and left undeveloped with argument are deemed waived). Indeed, the State is not even required to respond to such conclusory and perfunctory issues. *Henderson v. State*, 569 So.2d 925 (Fla. 1st DCA 1990)(declining to consider the issue because a perfunctory argument does not properly present the issue for appellate review and noting the State's "justifiable" lack of response).

Merits

In *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*), this Court held that counsel's concession of guilt to the charged crime amounts to an involuntary plea and is *per se* ineffective. Nixon claimed that his counsel was *per se* ineffective for conceding his guilt to first degree murder in closing of the guilt phase.[12] During closing, Nixon's trial counsel said:

> I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson.

Nixon, 758 So.2d at 620. Nixon was not present when his attorney made the concession. *Nixon*, 758 So. 2d at n.3. The *Nixon II* Court concluded that *Cronic*,[13] not *Strickland*,[14] applied because a concession to the charged crime fails to subject the prosecution's case to meaningful adversarial testing. *Nixon*, 758 So.2d at 621-623. The Court noted that under *Cronic*, prejudice is presumed. The *Nixon II* Court reasoned that counsel's concession to the charged crime operated as the

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[12] The claim originated in the direct appeal. This Court attempted to develop the record by relinquishing jurisdiction during the direct appeal. However, when that could not be done due to attorney/client privilege, this Court declined to rule on the claim in the direct appeal without prejudice to raise the claim collaterally where the privilege would be waived.

[13] *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984).

[14] *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

"functional equivalent of a guilty plea." *Nixon*, 758 So.2d at 624. The Court explained that concessions are not *per se* ineffectiveness if the defendant consents to the concession.[15] The *Nixon II* Court observed that the dispositive question was whether Nixon had given his consent to the trial strategy of conceding guilt. *Nixon*, 758 So.2d at 624. The *Nixon II* Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy"

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[15] The *Nixon* Court relied on three federal circuit cases: *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991); *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) and *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981). Both *Swanson* and *Wiley* were non-capital cases. Unlike a non-capital case where there is no reason to concede to the charged crime, in a capital case conceding to the charged crime is a reasonable trial tactic. In the words of one court, it is "necessary for counsel to retreat from an unlikely acquittal of a patently guilty client, so that he might attain the more realistic goal of saving the client's life." *Young v. Catoe*, 205 F.3d 750, 760 (4th Cir. 2000). Counsel's focus in a capital case is on the sentence, not the conviction. Obtaining a life sentence is winning a capital case. Moreover, the Ninth Circuit has declined to apply this rule to non-capital cases. *Anderson v. Calderon*, 232 F.3d 1053, 1087 (9th Cir. 2000). Furthermore, the other federal circuits have refused to apply *Cronic* or find *per se* ineffectiveness under these facts. *Baker v. Corcoran*, 220 F.3d 276, 295 (4th Cir. 2000); *Hale v. Gibson*, 227 F.3d 1298, 1323 (10th Cir. 2000)(holding counsel was not ineffective when, during closing argument of the guilt phase, counsel stated there was no doubt defendant was involved in capital crime, in light of overwhelming evidence but argued the extent of his participation and that he was not the only participant because it was a reasonable strategic decision to concede some involvement by Hale, given the overwhelming evidence presented at trial, and focused on the extent of his involvement and whether others could have been involved). The Eleventh Circuit has likewise applied *Strickland* and failed to find prejudice. *Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001).

and "[s]ilent acquiescence is not enough." *Nixon*, 758 So. 2d at 624. The trial court had originally denied the claim without an evidentiary hearing. This Court reversed the summary denial and ordered an evidentiary hearing be held. *Nixon*, 758 So. 2d at 625.[16]

In *Bell v. Cone*, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), the United States Supreme Court, in a capital case, held that *Strickland,* not *Cronic,* governed a claim that counsel was ineffective for failing to present any mitigating evidence and waiving closing argument at the penalty phase. Cone murdered an elderly couple during a 2-day crime spree during which he also committed robbery, shot a citizen and shot a police officer. Defense counsel conceded that the defendant committed the crimes. His defense that he was not guilty by reason of insanity due to substance abuse and post-traumatic stress disorder related to his Vietnam military service. The

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[16] In *Nixon v. State*, 28 Fla. L. Weekly S 597 (Fla. July 10, 2003) (*Nixon III)*, this court reversed the trial court's denial of post-conviction relief and remanded for a new trial. At the evidentiary hearing held to follow the mandate of *Nixon II*, Nixon's trial counsel testified that Nixon did nothing when asked his opinion regarding this trial strategy. Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt. Nixon did not testify at the evidentiary hearing. The trial court found, based on the history of interaction between Nixon and his trial counsel where counsel would inform Nixon of something and Nixon would remain silent, that Nixon had approved of counsel's strategy. However, the *Nixon III* Court disagreed with the trial court's conclusion, reasoning that the evidentiary hearing testimony, at most, demonstrated silent acquiescence by Nixon to his counsel's strategy. The *Nixon III* Court found there was no competent, substantial evidence establishing that Nixon affirmatively and explicitly agreed to counsel's strategy.

defense was supported by expert testimony about his drug use and by his mother's testimony that he returned from Vietnam a changed person. The jury found him guilty on all charges. At the penalty phase, counsel gave a short opening argument referring to the mitigating evidence introduced during the guilt phase. Counsel presented no witnesses at the penalty phase. The State gave a low-key closing argument. Defense counsel waived closing argument forcing the State to waive its rebuttal argument. The jury voted for death. The Sixth Circuit found that defense counsel had entirely failed to subject the prosecution's case to meaningful adversarial testing and therefore, *Cronic*, applied. The United States Supreme Court disagreed, holding that *Strickland* applied. The Court reasoned that for *Cronic* to apply, the attorney's failure must be complete. They pointed out, we said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, at 659 (emphasis in original). Because respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points, *Strickland* applied. The Court found counsel was not ineffective for failing TO call any witnesses or for waiving closing argument in the penalty phase. See *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002)(en banc)(holding *Strickland*, not *Cronic*, governed attorney concessions of guilt, relying on *Bell v. Cone*, 535 U.S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843, 1850 (2002) and finding no ineffectiveness where counsel conceded to lesser included

offense of second degree murder, in a capital case, even though the defendant specifically objected to the concession at trial and asserted his innocence).

While conceding guilt to the charged offense without the defendant's explicit consent is *per se* ineffectiveness, conceding to a lesser included offense is not. *Atwater v. State*, 788 So.2d 223, 229 (Fla. 2001)(holding, in a capital case, that it is not *per se* ineffectiveness to concede to second degree murder in closing in an attempt to maintain credibility with the jury by being candid in light of the overwhelming evidence and such a concession, which was made only in rebuttal to the State's closing argument, unlike *Nixon*, was reasonable); *State v. Williams*, 797 So.2d 1235, 1240 (Fla. 2001)(distinguishing situation where counsel concedes to lesser included offense from *Nixon* where counsel conceded his client's guilt to the crime charged); *Griffin v. State*, No. SC01-457, 2003 Fla. LEXIS 1621 (Fla. September 25, 2003)(finding trial counsel's concession of guilt to the lesser offenses was proper trial strategy and observing that sometimes a concession of guilt to some of the prosecutor's claims is good trial strategy and within defense counsel's discretion in order to gain credibility and acceptance of the jury). Conceding to second degree murder when the charge is first degree and the jury convicts of first degree murder is not the functional equivalent of a guilty plea. Or more precisely, the jury has rejected the "involuntary plea" of second degree murder. The jury's verdict of first degree murder in that situation is the result of adversarial testing at trial,

not the guilty plea to second degree murder, whether voluntary or not. Even if the jury convicts the defendant of second degree murder when counsel concedes to second degree in a first degree murder case, the jury's verdict is not the result of trial counsel's concession. In such a case, the prosecutor is going to dispute the concession either directly or by implication when he argues for a first degree murder conviction. Normally, in a true plea, the State is silent and does not dispute the degree of the crime. In this situation, the prosecutor is taking an adversarial position to the concession and the jury had to decide facts that were disputed by the parties which is the hallmark of adversarial testing. Such a verdict is not the result of a guilty plea, it is a result a true trial.

Here, counsel did not concede to first degree murder. He was arguing that if the prosecutor could prove all the facts he said he could, then it was first degree murder but that the prosecutor could not prove those facts. Trial counsel specifically argued that the State had not proven premeditated first-degree murder in his closing. He invited the jury to find Peterka guilty of manslaughter, but not first degree murder because there was no evidence of first degree murder. (T. Vol. X 1814-1815). Here, counsel conceded, at most, to the lesser crime of manslaughter. Thus, the trial court properly denied this claim.

ISSUE II

DID THE TRIAL COURT PROPERLY FIND TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO INFORM THE DEFENDANT OF HIS RIGHT TO TESTIFY AT THE GUILT PHASE? (Restated)

Peterka contends that his trial counsel was ineffective for failing to inform him of his right to testify during the guilt phase. After an evidentiary hearing exploring this issue, the trial court found the testimony of lead trial counsel that he did inform Peterka of his right to testify to be credible. This is a finding of fact that counsel was not deficient. Furthermore, there is no prejudice. The jury heard Peterka explain his version of the events in his videotaped confession. His testimony at the guilt phase would have been merely cumulative of his statements on the tape. Thus, there is no prejudice. The trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court ruled:

> Ground three of the motion alleges that the Defendant did not receive the effective assistance of counsel guaranteed to him through the Sixth and Fourteenth Amendments of the United States Constitution because defense counsel failed to properly advise Mr. Peterka of his right to testify; Mr. Peterka wanted to testify and never knowingly, intelligently, freely and voluntarily waived his right to testify. The Defendant alleges that had he known of his right to testify he would have insisted on taking the stand in the defense case in chief and had he done so that the result of the proceeding would probably have been different.
>
> The Court finds that the testimony of Mr. Loveless regarding his discussions with Mr. Peterka regarding his right to testify is credible and rejects the Defendant's assertion in his motion that he was not informed of his right to testify. Mr. Loveless did discuss with Mr.

> Peterka his right to testify in this case and Mr. Peterka made a decision not testify at his trial.[17]

(PCR Vol. III 583)(footnotes included but renumbered).

Trial

Peterka testified at the motion to suppress hearing held prior to the jury trial. (T Vol. II 313; EH Vol. VI 361). While Peterka did not testify during the guilt phase, he did testify in his own behalf during the penalty phase. (T. X 1904). During the guilt phase, the defense did not present any witnesses. Before closing argument and before the defense rested, a jury instruction conference was held with the defendant present. (IX 1721). During the charge conference, the prosecutor referred to the jury instruction about the defendant not testifying. (IX 1721). The written jury instruction contained a statement about the defendant not testifying. (X 1839). Defense counsel objected to the form of this instruction in the presence of the defendant.(X 1839).

Evidentiary hearing testimony

Mr. Harllee, who was second chair and in charge of the penalty phase, testified that while he could not specifically remember informing Peterka of his right to testify during the guilt phase, he has "never gone to trial once in a criminal case without talking to the defendant about his right to testify." (EH Vol. VI 245). Mr. Harllee testified that Mr. Loveless

[17] Evidentiary hearing transcript, Vol. II, P. 359.

probably discussed the right to testify with Peterka because Mr. Loveless was dealing with the guilt phase. (EH Vol. VI 277).

Peterka testified at the evidentiary hearing. However, when recalled to the stand, Peterka declined to testify regarding this claim. (EH VI 298-304). Peterka, on the advice of collateral counsel, did not testify regarding this claim. (EH VI 301-303). The prosecutor informed Peterka that he might be waiving the claim by failing to testify. (EH VI 304).

Mr. Loveless, lead counsel who conducted the guilt phase, testified that he fully discussed his right to testify with Peterka as he did in every case. (EH Vol. VI 359). Trial counsel testified that he has never failed to do this. (EH Vol. VI 359). Trial counsel testified that he recommended that Peterka not testify during the guilt phase, but that Peterka certainly knew that he could testify if he wanted to do so. (EH Vol. VI 359). Trial counsel recommended that Peterka not testify because Peterka's defense could be presented through his prior statements without his being subject to cross-examination. (EH Vol. VI 359). It would also help keep out his prior record.

Waiver

Peterka waived this claim by failing to testify at the evidentiary hearing regarding the matter. ***Owen v. State***, 773 So.2d 510, 515 (Fla. 2000)(finding a waiver of ineffectiveness claim based on conduct at the evidentiary hearing to prevent the factual development of the issue). There is no evidence that counsel did not inform Peterka of his right to testify at the

guilt phase. The allegations in his 3.850 are not sufficient and are not evidence. Having been granted an evidentiary hearing on this claim, Peterka had to testify that his counsel did not inform of the right to testify to support this claim. By not doing so, he waived this claim.

Merits

After an evidentiary hearing exploring this issue, the trial court found the testimony of lead trial counsel that he did inform Peterka of his right to testify to be credible. This is a finding of fact that trial counsel was not deficient. ***Wike v. State***, 813 So. 2d 12, 18 (Fla. 2002)(agreeing that trial counsel's performance was not deficient and finding competent, substantial evidence to support the trial court's findings of fact regarding a motion for change of venue not being filed against the defendant's wishes). Indeed, there is no evidence that counsel did not inform Peterka of his rights. The sole evidence on this issue is that trial counsel did so.

Nor is there any prejudice to the defendant. In ***Daniels v. Lee***, 316 F.3d 477, 490-491(4th Cir. 2003), the Fourth Circuit rejected a claim of ineffectiveness for failing to inform the defendant of his right to testify. The Court explained that while there was no waiver colloquy, the record reflected that Daniels was present during voir dire when his lawyers questioned prospective jurors on how they would react if Daniels decided not to testify. Second, Daniels had initially expressed a desire to testify during the guilt phase but, after discussing the

matter with his lawyers, he had decided not to take the stand. Finally, at the outset of the trial's sentencing phase, the court advised all those present, including Daniels, as follows:

> All right, before we bring the jury in, let me say that for this phase of the trial, I have requested that the deputies leave the leg irons on Mr. Daniels. Now, even though I have requested that, that will not be displayed in the presence of the jury if Mr. Daniels decides to take the witness stand and testify.

Based on this evidence, the trial court found that Daniels was aware of his right to testify. The *Daniels* Court noted that other than offering general after-the-fact denials that he was unaware of his right to testify, there was no evidence to rebut the trial court's findings.

In *Washington v. Kemna*, 16 Fed. Appx. 528 (8th Cir. 2001), the Eighth Circuit held that there was no prejudice from counsel's failure to inform the defendant of his right to testify. First, the court determined that the record, while unclear, established that counsel had told the defendant about the right to testify and therefore, counsel's performance was not deficient. However, the court assumed for the sake of argument that counsel's performance could be characterized as deficient, but explained Washington had failed to demonstrate any prejudice. Washington's testimony at trial would have merely reiterated the alibi defense already provided through the trial testimony of his mother. Had he testified, Washington would have told the jury (as his mother already had) that he was at home at the time of the alleged offenses. The Eighth Circuit concluded that Washington's testimony would not have altered the verdict.

Here, Peterka had testified in the motion to suppress in this case. (T. II 313). Additionally, the defendant testified at the penalty phase. Furthermore, he was present when the jury instruction regarding his not testifying was discussed. The implication of this jury instruction is that the defendant has the right to testify. He had a prior criminal record. He had been informed by a prior judge and by previous counsel about his right to testify at trial in the prior case. All that matters is that defendant was aware of his right to testify, the source of that information does not matter. Whether counsel informed him or not, Peterka knew of this right. It defies belief to think that Peterka knew he could testify at the motion to suppress hearing and at the penalty phase, but thought that he could not testify at the guilt phase. What did he think the jury instruction meant?

Here, as in *Washington*, there was no prejudice because Peterka's videotaped confession was played for the jury. Peterka placed his version of events in front of the jury without being subjected to cross-examination by the prosecutor. Counsel's bold assertion that they jury "certainly would have believed him and returned a verdict of less than first degree murder" does not explain why the jury, who heard his version on videotape and did not believe it, would have believed Peterka's version if presented live. IB at 59.

Collateral counsel's assertions of ineffectiveness are contradictory. First, she claims that trial counsel was ineffective for failing to inform Peterka of his right to

testify and then she claims that counsel was ineffective for recommending that Peterka not testify. Either trial counsel did not inform his client of the right to testify or trial counsel recommended that Peterka not testify (thereby implicitly informing him of the right). He cannot have been ineffective both ways. The claim in the trial court was that trial counsel did not inform him of his right to testify and Peterka is limited to that claim on appeal.

In an abundance of caution, the State will address the alternative, albeit inconsistent, claim of ineffectiveness. Trial counsel was not ineffective for advising Peterka not to testify at the guilt phase. Collateral counsel argues that it made no sense to advise Peterka not to testify because his prior Nebraska theft convictions had already been introduced by the State as the motive for the murder. IB at 58. Trial counsel's "basic" reason for advising Peterka not to testify was that his version was going to be presented to his jury via his statements and there was nothing that needed to be added. As trial counsel noted, this permitted the defendant to present his defense in his own words without being cross-examined. Collateral counsel attacks the trial counsel's additional explanations but not this one which was trial counsel's main reason for this advice. Moreover, while Peterka's prior Nebraska convictions were already in evidence, if he had testified he could have opened the door to his prior juvenile convictions being introduced. Indeed, this is exactly what happened when his mother testified during penalty phase that he was a loving and caring child.

Peterka, 640 So.2d at 70. While Peterka's version was consistent to counsel and the police, it may not have been so consistent under a seasoned prosecutor's cross-examination. (EH Vol VI 360). Thus, counsel was not ineffective for failing to inform Peteraka of his right to testify at the guilt phase or for advising Peterka not to testify at the guilt phase.

ISSUE III

DID THE TRIAL COURT PROPERLY FIND TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT MITIGATING EVIDENCE OF HIS SERVICE IN THE NATIONAL GUARD AND GOOD CONDUCT IN JAIL AT THE PENALTY PHASE? (Restated)

Peterka asserts that his trial counsel was ineffective for failing to present mitigating evidence of his service in the National Guard and good conduct in jail at the penalty phase. Most of the mitigating evidence, such as his relationships with his family, prior peaceful behavior within his family and prior good deeds, was, in fact, presented to the jury during penalty phase. The National Guard service was mentioned at the penalty phase but counsel made a tactical decision not to focus on his military service because Peterka had committed a crime leading to his discharge while he was in the National Guard. As counsel testified at the evidentiary hearing, he was dealing with a jury from a military area which would view committing a crime while in the service as besmirching the military. The model inmate evidence was not available to counsel because the escape occurred after the penalty phase. Nor was counsel ineffective for failing to present the escape to the judge. Peterka never informed counsel of the escape. Thus, the trial court properly denied this ineffectiveness claim following the evidentiary hearing.

The trial court's ruling

The trial court found:

> The Defendant alleges ineffective assistance of counsel because his trial counsel did not present certain

mitigation evidence of his military record, jail behavior, relationships with his family, prior peaceful behavior within his family and prior good deeds. The Defendant argues that the cumulative effect of his trial counsel's failure to present this mitigating evidence entitles him to a new penalty phase. This allegation fails to establish either prong of the two prong test under *Strickland v. Washington*, 466 U.S. 668 (1984). To have merit under *Strickland*, a defendant must show counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defendant.

As to the allegation that trial counsel was ineffective for failing to present penalty phase evidence of his commendations and leadership during his one year tenure in the Minnesota National Guard, the Court finds that the performance of Mr. Harllee was not deficient nor was there any resulting prejudice to the Defendant.[18]

Mr. Harllee testified that with the assistance of Bill Graham, Investigator for the Okaloosa County of the Public Defender, that he prepared for the penalty phase for approximately three to four months prior to trial. Mr. Harllee met with the Defendant, spoke to his family over the phone, as well as, met with them in person in preparation of the penalty phase. Further, a detailed 30-40 page questionnaire was prepared with the Defendant's assistance, which provided personal information of the Defendant. Mr. Harllee testified that he was almost positive that the public defender's questionnaire administered to the Defendant had a space for military background or military history. This questionnaire along with the public defender's intake form and conversations with the Defendant and his family provided the information and basis for the presentation of mitigation evidence. Thus, the Defendant was asked about his military record months before his trial and if the defense team was unaware of any details of his military service, Mr. Peterka chose not to provide the information.

Further, Mr. Harllee testified that the decision to not put Peterka's military background into the case was a tactical decision based on the fact that the Defendant had committed illegal acts while in the military which led to his general discharge under honorable conditions. In addition, one penalty phase witness had already testified that the Defendant had been in the National Guard;

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[18] As to the allegations raised in these claims, the Court has considered the testimony of Mark Harllee, Esq., Earl D. Loveless, Esq., and investigator Bill Graham that was presented during the evidentiary hearing. Evidentiary hearing transcript, Vol. II and III.

therefore, Mr. Harllee made the decision not to present any further military record evidence since the State could destroy the positive impact of the fact that the Defendant had served in the National Guard by presenting evidence of the acts that brought about his discharge from the military.

Thus, trial counsel made a reasoned tactical decision that was not deficient under the *Strickland* two prong test, and any omission regarding Mr. Peterka's military service did not prejudice the Defendant in light of the aggravating and mitigating factors that were presented during the penalty phase of the trial.

As to the allegation that Defendant's trial counsel was ineffective for failing to present evidence during the penalty phase that Mr. Peterka was a model inmate, both attorneys for the Defendant testified that if there had been any evidence of good jail conduct that they would have presented it. The Defendant called Lt. Allen Atkins' to testify as to his conduct as an inmate.[19] Lt. Atkins had to testify from memory since the jail records regarding Peterka's incarceration had been destroyed pursuant to standard jail procedure. Lt. Atkins could not specifically recall Peterka's conduct, but described him from memory as being "a little better" than other inmates who were charged with murder or were considered violent. However, Lt. Atkins could not recall any specific behavior or incident that would make the Defendant any different than any other inmate "trying to act properly." The Rebuttal Closing Argument of the Defendant argues that "despite the passage of time . . . Lt. Atkins remembered Dan Peterka." Indeed, Lt. Atkins did remember a first degree murder inmate; however, his memory of the Defendant is vague and to imply that his testimony provides evidence of mitigation that existed at the time of the trial penalty phase is speculative.

The Defendant further argues that trial counsel rendered ineffective assistance of counsel for failure to present evidence that he refused to participate in an escape. However, Mr. Peterka testified that the incident occurred after the jury penalty phase; thus, this evidence would not have had any impact on the jury's penalty recommendation.[20] Furthermore, the Defendant testified that he did not tell his attorneys about the escape attempt and his decision not to participate in the escape; thus, the Defendant is responsible for failing to provide his attorneys with this information.[21]

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[19] Evidentiary hearing transcript, Vol. III, P. 490-499.

[20] Evidentiary hearing transcript, Vol. I, P. 195-196.

[21] Evidentiary hearing transcript, Vol. II, P. 207.

> The Court finds that the Defendant's trial counsel did not render ineffective assistance of counsel for failing to present evidence of model jail conduct in mitigation. The Court specifically finds the testimony of Mr. Harllee and Mr. Loveless to be credible and that they would have presented evidence beneficial to the Defendant if it had in fact existed. Further, there is no reasonable probability that the outcome would have been different even if evidence had been presented that Peterka had been a model inmate and chose not to participate in an escape attempt in light of the overwhelming evidence presented during the trial proceedings.

(PCR Vol. III 584-587)(footnotes included but renumbered).

Trial

The defendant's girlfriend from Nebraska, Cindy Rush, testified at the penalty phase. During her testimony, she mentioned in passing that the defendant had been in the National Guard. (T. X 1882). She also testified to his loving relationship with his siblings. (T. X 1882). She also testified to his nursing a dog with a broken leg and a family cat that had been hit by a car. (T. X 1885). She described him as a good person. (T. X 1885). Connie LeCompte, whose family Peterka had lived with, testified that he was like a daddy to her two little girls. (T. X 1876). She testified that Peterka took care of her children when she had to have an emergency operation, that he gave her money for a car when her car was repossessed, he bought things for the new baby when needed and he "would give you the shirt off his back" (T. X 1877) His mother, Linda Peterka also testified about his loving relationship with his brothers and sisters and how he taught his brother to play baseball. (T. X 1889). She testified about how his seven-year-old sister cries about him. (T. X 1891). She testified about his

grandparents, aunts & uncles and his cousins who love him. (T. X 1893). His mother also testified that Peterka's father could not testify during the penalty phase because he suffered a heart attack. (T. X 1894). She then testified about his relationship with his father. (T. X 1895). She testified that he was "good" and "his whole family loves him". (T. X 1896). She also testified that while he had prior juvenile convictions, the crimes were not violent. (T. X 1903).

Evidentiary hearing testimony

At the evidentiary hearing, Peterka testified that he was never asked about his National Guard service when he testified at the penalty phase. (EH V 192). Peterka then testified as to a commendation he received for being a platoon leader in basic training and the class leader in advanced individual training while in the National Guard (EH V 196). The commendation was introduced as defense exhibit #4. (EH V 196; EH V 18). His general discharge from the National Guard was also introduced as defense exhibit #1. (EH V 17). However, he was discharged from the National Guard because of his Nebraska conviction. (EH VI 205).[22]

Mark Harllee, penalty phase trial counsel, testified that normally any mitigation related to military service should be presented because the area where the trial was conducted was a

[22] Chief Investigator Graham of the PD's office also testified that the reason Peterka was discharged from the National Guard was he had been sentenced to prison for burglaries he committed while in the National Guard. (EH VII 547-548)

military area. (EH VI 230). However, he also testified that because Peterka's discharge from the Minnesota National Guard was based on fact that he was going to be sent to prison based on his Nebraska conviction, there was a "negative" side to the military service mitigation. (EH VI 229-230). If a defendant engaged in illegal conduct while being in the military, this type of mitigation "could actually cut against you". (EH VI 230). The prosecutor noted that if penalty phase counsel had introduced military service as a mitigator, he would have attacked the weight of the mitigation by pointing out that Peterka had to be discharged from the military based on his illegal conduct while in the military and penalty phase counsel responded: "I would expect nothing less from you." (EH VI 230). Penalty phase counsel testified that his decision today, as well as eleven years ago, would be not to introduce the military service mitigation. (EH VI 230). During cross-examination, penalty phase counsel testified that it was a tactical decision not to present the military service mitigation. (EH VI 258). He explained that "this is a very heavy military area" with many retired military people. (EH VI 258). Jurors, with a military background, normally, are impressed with a good record in military service; however, it could have a negative impact with such jurors if a defendant committed crimes while in the military. (EH VI 258). Such conduct could be viewed as "besmirching the name of the military." (EH VI 259). Penalty phase counsel admitted that he did not think the crimes were committed while Peterka was on duty. (EH VI 259). Collateral

counsel asked penalty phase counsel to explain the downside of presenting military service as mitigation when they had stipulated to the under sentence of imprisonment aggravator. (EH VI 259). Penalty phase counsel noted that the military service was mentioned by one witness during the penalty phase. (EH VI 259). Penalty phase counsel decided to leave it at that, fearing that if the military service was highlighted, the prosecutor would "come back and destroy" it. (EH VI 259-260). He did not recall presenting any evidence regarding Peterka's military commendations. (EH VI 260). Penalty phase counsel explained, that while he was not familiar with military matters, co-counsel was an ex-military person who knew the difference between an honorable and a dishonorable discharge. (EH VI 285-286). The judge, who was an "old military fellow" himself, noted that it was a general discharge under honorable conditions. (EH VI 286). Penalty phase counsel noted that they would have to explain the general discharge which is why they "didn't bring out more". (EH VI 286). On re-direct, penalty phase counsel testified that being kicked out of the service early because you were committing felony crimes would have an "extremely negative impact." (EH VI 289). Penalty phase counsel noted from his experience living in this area, "disgracing the military was about the worst thing you could do."

Guilt phase counsel, PD Loveless, testified that he was aware of Peterka's military service in the National Guard. (EH VI 326). Prior to law school, guilt phase counsel was in the Marine Corp for ten years. (EH VI 328). He was a captain and

served on the discharge boards. (EH VI 328-329). General discharges are often given in lieu of further disciplinary actions. (EH VI 329).

Peterka testified that he was never asked about his conduct while in jail awaiting trial at the penalty phase. (EH V 192-193). He testified that he had no disciplinary reports during the ten months he was in jail. (EH V 193). Peterka also testified regarding an escape by his three cellmates. (EH V 194-195). He refused to participate in the escape. (EH V 195). However, Peterka could not recall the names of any of his cellmates. (EH VI 206). The escape occurred after the penalty phase but prior to the final sentencing. (EH V 195-196). Peterka admitted, at the evidentiary hearing, that he never informed counsel of the escape. (EH VI 207-208). He "just assumed they knew because of all the fuss" at the jail and the newspaper accounts. (EH VI 207-208).

Lt. Atkins of the Okaloosa County jail testified at the evidentiary hearing. (EH VII 490). He worked at the county jail when Peterka was an inmate. (EH VII 491). Peterka did not cause any problems that he could remember. (EH VII 492). The jail records from this period of time were destroyed. (EH VII 494,496).[23] Peterka's conduct was "maybe a little better than normal." (EH VII 494,499). Peterka was courteous to the officers which makes the officer's job easier. (EH VII 497). He could not

[23] Martha Shurgot, who maintains the inmate records at the county jail, testified that the inmate records from this period of time were destroyed as a routine administrative practice. (EH VII 499-504).

recall any particular incident that would cast Peterka in a better light than an ordinary inmate. (EH VII 496). Lt. Atkins believed that he would recall any successful escape that occurred during this period and he did not recall any such escape. (EH VII 494-495). Peterka was housed in the downstairs with other maximum security inmates, such as other murder suspects. (EH VII 495,498).

Mark Harllee, trial penalty phase counsel, testified that he did not have an independent recollection of any discussion about whether to present jail conduct as mitigation. (EH VI 231). He knew that good jail conduct could be considered as mitigation evidence and had used such conduct as mitigation "many times". (EH VI 231,276). Penalty phase counsel did not automatically present good jail conduct as mitigation based merely on the lack of DRs while in jail. (EH VI 231-232). He thought that he would have presented such evidence if he had it. (EH VI 277). Penalty phase counsel was not aware of the escape attempt that Peterka claimed he did not participate in. (EH VI 232). Penalty phase counsel thought he would recall the escape if he had been informed of it. (EH VI 232-233). On cross-examination, he again did not think he ever heard anything about the escape.(EH VI 274).

Guilt phase counsel, PD Loveless, testified that he was aware that good jail conduct was considered mitigating evidence although he had never presented it before. (EH VI 321, VII 426). He has his "doubts about how it's received by a jury" (EH VII 427). He was certain he would have considered good jail

conduct, but did not testify that he would have presented it. (EH VI 321). He could not recall consideration of this type of mitigation. (EH VI 322). He has considered it in "virtually every case" he has had, but has never used it. (EH VI 323). His normal course of conduct would be to look into it. (EH VI 323). He was not aware of the escape. (EH VI 325). He would have presented the escape if he had been aware of it. (EH VI 325). He could not have had any knowledge of the escape or he would have used it in his sentencing memorandum. (EH VI 323).

Chief Investigator Graham of the PD's office also testified. He explained that the form the PD's office used in 1989 for mitigation contained a line for military service. (EH VII 518). The form also contained a line for jail conduct. (EH VII 522). He also was not aware of the escape. (EH VII 529-530).

Merits

Peterka's relationships with his family, his prior peaceful behavior within his family, and prior good deeds were presented during the penalty phase. The defendant's girlfriend from Nebraska, Cindy Rush; Connie LeCompte, whose family Peterka had lived with; and his mother, Linda Peterka all testified at the penalty phase as to the information. As penalty phase counsel testified at the evidentiary hearing, he wanted the jury to know that Peterka was loved by his family so they would not vote for the death penalty and this was the only violent act Peterka had

committed. (EH VI 292-293). Penalty phase counsel presented Peterka's mother and girlfriend who testified that was he was good person who helped animals. (EH VI 292-293). He remembered several jurors crying during penalty phase when Peterka's mother pled for mercy. (EH VI 293). Trial counsel cannot be ineffective for failing to present mitigating evidence that he, in fact, presented. *Atwater v. State*, 788 So. 2d 223, 233 (Fla. 2001)(rejecting an ineffectiveness claim for failing to present mitigation because Atwater's personal and family history were, in fact, presented in the penalty phase); *Downs v. State*, 740 So. 2d 506, 515-16 (Fla. 1999)(rejecting an ineffective assistance of counsel claim for failing to present mitigation evidence because most, if not all, of the evidence was, in fact, presented).

Trial counsel testified that he did not want to focus or highlight the National Guard because the trial was conducted in a heavily military area and jurors with a military background would view committing crime while in the military as "besmirching the name of the military." (EH VI 259). Collateral counsel argues that trial counsel's explanation "does not make sense" and was "unreasonable" because Peterka did not commit the crime on the base and because the jury had already heard about the Nebraska conviction. IB at 65-66. While the jury had already heard about the conviction, they did not know this conviction was the reason for his general discharge from the National Guard. Moreover, regardless of whether he committed the crime on the military base itself, the crime occurred while

he was in the National Guard and was the cause of his discharge. The disgrace to the military occurs because he is in the military, not based on the geographical location of the crime. While collateral counsel may think this is a distinction that would matter to the jury, penalty phase counsel, who had experience trying cases in front of juries from this particular area, did not. Penalty phase counsel noted, from his experience living in this area, "disgracing that military was about the worst thing you could do." (EH VI 290). While acknowledging the trial occurred in a "heavily populated military area", collateral counsel basically argues that it was worth the risk. This is not ineffectiveness; rather, this is a disagreement about trial strategy between trial counsel and collateral counsel. Collateral counsel simply has a different view of the value of this evidence versus the risks than penalty phase counsel.

Furthermore, his military service with the National Guard was mentioned in passing during the penalty phase, and penalty phase counsel thought it was better to plant this seed with the jury without focusing on it because focusing on it would provoke the prosecutor into "destroying" it by introducing evidence that the reason Peterka was discharged from the military was that he was going to be serving a prison sentence for a crime he committed while in the military. This is a reasonable tactical decision immune to an ineffectiveness attack. *Downs v. State*, 453 So. 2d 1102, 1108 (Fla. 1984)(explaining that strategic or tactical decisions by counsel made after a thorough investigation are

"virtually unchallengeable."); *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994)(explaining that a lawyer's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness which is "virtually unchallengeable."). As penalty phase counsel testified, today, as at the time of trial, he would not introduce this evidence for tactical reasons.

Nor is there any prejudice. This is not compelling mitigation. Peterka's military service consisted of the total of one year in a state National Guard.[24] He was not in a combat or in any danger. Presenting his commendations while in the military, especially when off set by the fact he was discharged for committing a crime while in the military, would not have changed the jury's death recommendation into a life recommendation.

The escape occurred after the penalty phase, but prior to sentencing. Counsel cannot be deemed to be ineffective for failing to present evidence that did not exist at the time of the penalty phase. *People ex rel. Carey v. Rosin*, 387 N.E.2d 692, 695 (Ill. 1979)(rejecting an ineffective assistance of counsel claim based upon his counsel's failure to present defendant's post-conviction behavior which did not exist at the time because "effective assistance of counsel does not include the ability to foretell the future"). So, this claim is limited

[24] Peterka's commitment to the National Guard was for a total of 8 years; however, he served only a portion of this commitment before he was discharged because he was going to prison. (EH VI 205).

to ineffectiveness for failing to present his lack of participation in the escape to the judge. However, Peterka admitted at the evidentiary hearing that he never informed counsel of the escape. (EH VI 207-208). Counsel cannot be ineffective for failing to present evidence that his client never told him about. Counsel had no reasonable means of discovering this type of mitigation without being informed of Peterka's lack of participation in the escape at this late date without Peterka himself disclosing it. It is not reasonable for Peterka to assume that counsel would discover this information on his own. Moreover, Peterka should have been aware from the PD's mitigation form that this is the type of thing he should have told counsel. Thus, there is no deficient performance because counsel cannot be expected to present evidence that his client did not tell him about.

Furthermore, there is no prejudice. While PD Loveless testified that he would have used the *Skipper*[25] mitigation if he had known about it, he also testified that while he has investigated such mitigation in nearly every case, he has never presented it because he doubts the effect of this type of mitigation on a jury. In *Skipper*, the prosecutor argued in closing that the defendant would pose disciplinary problems if sentenced to life and would likely rape other prisoners. Here, unlike *Skipper*, the prosecutor did not make a future dangerousness argument. Trial counsel did not need to rebut a

[25] *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986),

future dangerous argument in the case. This mitigation, when compared to the five aggravators, which included CCP and under sentence of imprisonment, would not have changed the judge's decision to sentence Peterka to death. Peterka killed the victim as part of a scheme to assume the victim's identity to avoid his pending prison sentence. Thus, there is no prejudice and the trial court properly found no ineffectiveness.[26]

[26] Collateral counsel faults trial counsel for failing to prevent Peterka's juvenile record from being admitted. IB at 72. Peterka's mother testified at the penalty phase that he was close to his family, helped others and was good. *Peterka*, 640 So.2d 70. The trial court ruled that this opened the door to Peterka's prior juvenile records. Trial counsel did not open the door to this evidence, as this Court so held in the direct appeal. *Peterka*, 640 So.2d 70. Trial counsel cannot be blamed for the trial court's erroneous ruling. *State v. Lewis*, 838 So. 2d 1102, 1118 (Fla. 2002)(noting that where defense counsel raised this very objection with the trial court, which ruled adversely to him, counsel was not ineffective).

ISSUE IV

DID THE TRIAL COURT PROPERLY FIND TRIAL COUNSEL WAS NOT INEFFECTIVE DURING JURY SELECTION? (Restated)

Peterka asserts that trial counsel was ineffective during jury selection when he failed to challenge prospective jurors for cause. The State respectfully disagrees. There is no deficient performance. None of the "for cause" challenges would have been granted and counsel is not ineffective for recognizing this. Nor is there any prejudice. Peterka was tried by a fair and impartial jury. Therefore, the trial court properly denied this claim of ineffectiveness following the evidentiary hearing.

The trial court's ruling

The trial court ruled:

> In ground one of the motion, the Defendant alleges that he was denied the effective assistance of counsel during voir dire examination of the prospective jury in violation of his Sixth, Eighth, and Fourteenth Amendment rights. As to the allegations set out in paragraphs C(1)(a), (1), and (m), the record conclusively demonstrates that the Defendant is not entitled to relief on these claims. Specifically, the claim raised in paragraph C(1)(a) is refuted by the trial transcript.[27] Trial counsel was not ineffective for failing to challenge juror Monroe for cause. Juror Monroe indicated that she would follow the law and understood the definition of premeditation. Claim C(1)(l) is refuted by the trial transcript.[28] Juror King stated that he could put aside the information he had acquired pretrial from the media and could return a verdict based solely on the evidence; therefore, trial counsel did not render ineffective assistance of counsel

[27] Trial Transcript, P. 561-562, attached hereto as Exhibit "B".

[28] Trial Transcript, P. 407-408, attached hereto as Exhibit "C". Exhibit C contains P. 404-421 and will be referenced under Claim C(1)(l), which is also an allegation regarding ineffective assistance of counsel regarding juror King.

for failure to challenge juror King for cause. Claim C(1)(m) asserts that trial counsel was ineffective for failing to object to the Court's decision to excuse for cause prospective juror Piccorossi. This allegation is procedurally barred from consideration for that reason that the Defendant raised excusing Piccorossi on direct appeal and the Florida Supreme Court found that the trial court did not abuse its discretion in excusing Piccorossi for cause. Peterka v. State, 640 So.2d 59, 65-66 (Fla. 1994). However, even if counsel could have or should have objected, the Defendant cannot demonstrate deficiency or prejudice to satisfy the requirements of Strickland v. Washington, 466 U.S. 668 (1984), since the Florida Supreme Court found the basic claim on appeal to be without merit.

Claims C(1)(b) through (k) were heard during the evidentiary hearing.

As to Claim C(1)(b) alleging ineffective assistance of counsel for failing to challenge juror Revolinsky for cause, the Defendant is not entitled to relief on this claim. Contrary to the Defendant's assertion that trial counsel failed to address the juror's response regarding whether or not a prior criminal record would affect his verdict, trial counsel did indeed address this remark by asking juror Revolinsky whether his opinion was "that these charges should be based on the evidence of these charges . . . and not on what a person might have done in the past?"[29] Juror Revolinsky did response "that could fall under the aggravating things;"[30] however, he did correctly response that he could base his verdict on the evidence presented.[31] Thus, juror Revolinsky's response did not indicate that he would apply aggravators overbroadly. It was an indication that he understood that prior criminal history should not play a role in determining the guilt of the defendant. Additionally, the prosecutor stated that the judge would give the jury a list of aggravating circumstances that they would consider in this case;[32] and, the judge did in fact properly instruct the jury during the penalty phase as to the aggravating circumstances in this case.[33] Thus, trial counsel did not render ineffective assistance of counsel for failing to challenge this juror for cause; and, there was no prejudice to the Defendant. Furthermore, during

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[29] Trial Transcript, P. 617, attached hereto as Exhibit "D".

[30] *Id*.

[31] *Id*.

[32] Trial Transcript, P. 612, attached hereto as Exhibit "E".

[33] Trial Transcript, P. 1905-1935, attached hereto as Exhibit "F".

the evidentiary hearing Mr. Loveless testified that he did not want to go into the Defendant's prior convictions with this juror since there were motions in limine pending aimed at preventing disclosure of the prior convictions.[34] Mr. Loveless made a reasoned tactical decision not to discuss the prior convictions any further with this juror and did not render ineffective assistance of counsel.

Ground C(1)(c) alleges ineffective assistance of counsel for failure to challenge juror Tomson for cause. The record conclusively demonstrates that the Defendant is entitled to no relief on this claim. Juror Tomson was rehabilitated by the prosecution and indicated that he understood the reasonable doubt burden and could accurately follow the law regarding reasonable doubt.[35] Thus, the Defendant's counsel's performance was not deficient nor did it prejudice the Defendant.

Ground (C)(1)(d) argues that trial counsel failed to challenge prospective jurors for cause who were "clearly biased" and failed to request peremptory challenges to disqualify objectionable jurors. Specifically, the Defendant asserts that juror Parker was predisposed to impose the death penalty and trial counsel used a peremptory instead of challenging this juror for cause. In response to questioning by Mr. Loveless, Juror Parker stated that he would set aside his personal beliefs and follow the law.[36] Thus, juror Parker was not clearly biased and the record conclusively demonstrates that the Defendant is not entitled to relief regarding this claim.

As to the allegation that juror White should have been challenged for cause by trial counsel as stated in Claim C(1)(e), the record conclusively demonstrates that the Defendant is not entitled to relief on this claim. Juror White stated that she understood that an arrest was nothing more than that and not an indication of guilt.[37] Further, she stated that she understood and could consider all degrees of murder.[38]

Claim C(1)(f) asserts that trial counsel failed to object to the court's "vague definition of aggravating circumstances. Again, the record conclusively demonstrates that the Defendant is entitled to no relief on this claim. The prosecutor told juror King that the

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[34] Evidentiary hearing transcript, Vol. II, P. 341-342.

[35] Trial Transcript, P. 716, attached hereto as Exhibit "G".

[36] Trial Transcript, P. 495-496, attached hereto as Exhibit "H".

[37] Trial Transcript, P. 648-651, attached hereto as Exhibit "I".

[38] *Id*.

Court would instruct the jury as to what things could be considered as an aggravating circumstance and she indicated that she would follow the law.[39] Moreover, the trial court did properly instruct the jury during the penalty phase.[40]

Claim C(1)(g) alleging ineffective assistance of counsel for failing to challenge juror Martin for cause is conclusively refuted by the record. The prosecutor explained to Juror Martin that the judge would give a list of what aggravating circumstances existed in this case and she stated that she understood and could follow the law.[41]

Claim C(1)(h) alleging ineffective assistance of counsel for failing to challenge juror Watson for cause is conclusively refuted by the record. Although the Defendant does correctly state in his motion the response of juror Watson to Mr. Loveless' question regarding whether there would be a penalty phase, he fails to state the response of juror Watson to Mr. Loveless' subsequent question, which was whether he [juror Watson] expected the Defendant to be convicted of first degree murder.[42] Juror Watson stated that he was "not saying that" he expected the Defendant to be convicted of first degree murder and further indicated that he understood that the state had to prove each and every element of the charge beyond a reasonable doubt; therefore, there is no indication that this juror had any bias against Mr. Peterka.[43]

In Claims (1)(i) and (k), the Defendant alleges that trial counsel failed to question prospective jurors about their understanding of intent, premeditation, and their attitudes toward the factual circumstances of the case, as well as, failed to inquire as to their understanding of burden of proof and reasonable doubt. Defendant's trial counsel made a tactical decision as to how to best conduct voir dire in this case and was not ineffective in his voir dire examination.[44]

As to Claim C(1)(j), the Defendant alleges deficient performance of trial counsel for failing to inquire into

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[39] Trial Transcript, P. 398-401, attached hereto as Exhibit "J".

[40] *See* Exhibit F.

[41] Trial Transcript, P. 962-965, attached hereto as Exhibit "K".

[42] Trial Transcript, P. 915-916, attached hereto as Exhibit "L".

[43] *Id*.

[44] Evidentiary hearing transcript, Vol. II, P. 337-340.

> the prospective jurors' opinions about Mr. Peterka's motive for fleeing Nebraska. Again, trial counsel was not deficient in his performance. The Defendant's trial counsel made a reasoned tactical decision not to inquire about the prospective jurors' opinions regarding the Defendant's motive for fleeing Nebraska for the reason that there were motions in limine pending to keep this information out of evidence; thus, trial counsel did not want to bring it to the attention of the jurors.[45]
>
> Claim C(1)(l) asserts that trial counsel failed to make reasonable challenges for cause which was deficient performance. Specifically, the Defendant alleges that juror King demonstrated biases and an inability to put these biases aside and that counsel should have challenged this juror for cause. The record conclusively demonstrates that the Defendant is not entitled to relief as to this claim. Throughout questioning, juror King indicated that she did not have any biases toward the Defendant.[46]

(PCR Vol. III 570-576)(footnotes included but renumbered).

Trial

During jury selection, guilt phase counsel challenged two jurors for cause, Mr. Peters and Mr. Proehl. These "for cause" challenges were denied. The defense used all ten peremptory challenges during jury selection. (T. VI 1031; EH VI 337). After using all ten peremptory challenges, trial counsel asked for two additional peremptory challenges to replace the two he used to strike Mr. Peters and Mr. Proehl. (T. VI 1031). The trial court denied the request for additional peremptory challenges. (T. VI 1031). The final jury included Joyce King, Jill Monroe, Michael Revolinsky, John Tomson and Tammy Martin. (T. VI 1093). Prospective juror Parker, prospective juror White and prospective juror Watson never sat on the jury. (T. VI 1093).

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[45] Evidentiary hearing transcript, Vol. II, P. 341-342.

[46] *See* Exhibit C.

Evidentiary hearing testimony

At the evidentiary hearing, guilt phase counsel testified regarding jury selection. (EH VI 336). He explained that voir dire was conduct in a relatively small room which gives counsel a "much better feel for the juror". (EH VI 337). He testified that he either requested a for cause challenge when there was a reasonable possibility it would be granted or preserved the error by objection. (EH VI 338). He could not recall why he did not explore the questions of firearms with more than the one juror. (EH VI 338-339). However, he noted that the firearm issue was "six of one, half a dozen of the other" because jurors who owned firearm would be good jurors during guilt phase because they would support a self-defense theory; whereas, jurors who did not own firearms would be good jurors during penalty phase. (EH VI 339). He did not think he needed to concentrate on the firearm issue. (EH VI 339). While he did not remember why he did not extensively question prospective juror regarding premeditation, the burden of proof and reasonable doubt, he noted from his prior experiences of jury selection with this particular prosecutor was that the prosecutor "used to take away all of our questions" (EH VI 339). He would only clarify an answer that he felt was necessary when the prosecutor covered these areas. (EH VII 410). The prosecutor noted that he usually extensively covered burden of proof and reasonable doubt. (EH VI 340). Guilt phase counsel noted that when you're

sitting virtually right next to the juror, you can make judgments regarding them from observation that is better than asking questions. (EH VI 340). Asking too many questions of the jurors can make them look too good subjects the jurors to challenges from the prosecutor. (EH VI 340). Guilt phase counsel did not question the prospective jurors regarding their views of Peterka's motive fleeing Nebraska because of his fear of prison life because counsel had a number of motions in limine to exclude this evidence pending before the court. (EH VI 340). Judge Fleet had ordered that counsel were not to discuss the convictions during jury selection or opening statements pending his final ruling in these motions. (EH VI 341). He did not want the jury informed of the underlying conviction but rather just explored in general their feelings about prior convictions without going any further into that area. (EH VI 342; EH VII 410). Trial counsel could not recall the reason he did not attempt to strike juror Revolinsky for cause. (EH VII 406-407). He would have made notes of jury selection for his files but the files were lost in the flood. (EH VII 407). Nor could he recall the reason he did not attempt to strike juror Tomson, prospective juror Parker, prospective juror White, juror King or juror Martin for cause without his notes. (EH Vol. VII 408-409).

Merits[47]

[47] The defendant has the burden of establishing a *prime facie* case of ineffectiveness. *Reaves v. State*, 826 So. 2d 932, 942 (Fla. 2002). Here, because of the delay between the trial

There is no deficient performance. Trial counsel used all ten peremptory challenges. Trial counsel was limited to for cause challenges. None of the "for cause" challenges would have been granted. In *Barnhill v. State*, 834 So. 2d 836, 844 (Fla. 2002), this Court rejected a claim that the trial court erred in refusing to excuse at least two jurors for cause, thereby forcing him to use his peremptory challenges to remove them. The *Barnhill* Court noted that the test for determining juror competency is whether the juror can set aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *Barnhill*, 834 So. 2d at 844, citing *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). The *Barnhill* Court noted, that in a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty. *Barnhill*, 834 So. 2d at 844, citing *Farina v. State*, 680 So. 2d 392 (Fla. 1996). None of the jurors that actually sat on the jury that Peterka now complains about meet the test for juror bias. None of the complained about jurors refused to follow the law or expressed an unyielding conviction and rigidity toward the death

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and evidentiary hearing, as well as trial counsel's loss of notes in the flood, counsel could not remember his reasons for striking or not striking various jurors. Trial counsel's jury selection strategy cannot be deemed unreasonable when trial counsel cannot remember what that strategy was. Enforcing this burden and ruling that a long delay causing trial counsel's loss of memory results in an affirmance would encourage post-conviction capital defendants to litigate these issues more quickly.

penalty.[48] Juror Joyce King, Juror Jill Monroe, Juror Michael Revolinsky, Juror John Tomson and Juror Tammy Martin were not

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[48] In *Overton v. State*, 801 So.2d 877, 893 (Fla. 2001), this Court concluded that the trial court did not abuse its discretion in denying a cause challenge as to a juror based on his views towards the death penalty. The juror noted that he favored the death penalty in cases where the defendant is found guilty of first-degree murder. However, after defense counsel, the State, and the trial court all explained the capital sentencing scheme and its balancing process to the juror, the juror expressed great deference to the trial court's instructions; stated that he would follow the law, abide by the sentencing scheme and could entertain the possibility of a life recommendation. See also *Kearse v. State*, 770 So.2d 1119, 1129 (Fla. 2000)(finding no abuse of discretion in refusing to excuse a juror for cause where the juror expressed his belief in the death penalty and his frustrations with the criminal justice system but, when the capital sentencing process was explained to him, juror unequivocally stated that he would follow the law); *Bryant v. State*, 656 So.2d 426, 428 (Fla. 1995)(concluding that the trial court did not err in denying cause challenges where five jurors who expressed a predisposition to impose the death penalty if the defendant was convicted of first-degree murder later stated that they would follow the court's instructions and weigh the aggravating and mitigating factors to determine whether death was the appropriate sentence); *Johnson v. State*, 660 So.2d 637, 644 (Fla. 1995)(affirming a refusal to excuse for cause a juror who had expressed favor toward the death penalty but who later noted that she thought she could follow the court's instruction with respect to sentencing); *Reaves v. State*, 639 So.2d 1, 4 n.6 (Fla. 1994)(finding no abuse of discretion on denying cause challenges in relation to two jurors who initially expressed a willingness to automatically impose the death penalty but who, after hearing an explanation as to the process of weighing aggravating and mitigating circumstances, acknowledged that they were capable of reviewing all of the evidence and following the court's instructions in considering a proper punishment); *Castro v. State*, 644 So.2d 987, 990 (Fla. 1994)(finding no error in the trial court's refusal to strike the prospective jurors for cause because of their views on the death penalty which included the “reasonable misunderstanding” that the presumed sentence for first-degree murder was death but when advised that they were responsible for weighing aggravating and mitigating factors, they indicated they would be able to follow the law).

subject to cause challenges. Neither was prospective juror Parker, prospective juror White or prospective juror Watson. Trial counsel is not deficient for recognizing that these for cause challenges were futile. Thus, there was no deficient performance.

Nor is there any prejudice. The cause challenge would have merely been denied. Nor was this trial court likely to grant gratuitously cause challenges. The trial court had already denied two "for cause" challenges and a request for two additional peremptory challenges. (T. VI 1031). The trial court certainly was not going to gratuitously grant eight "for cause" challenges or grant a request for ten additional peremptory challenges. Peterka would have been tried in front of these exact same jurors regardless of whether trial counsel made any futile for cause challenges or not. Collateral counsel asserts that the prejudice is that had counsel made these for cause challenges, trial counsel would have been able to use his peremptory challenges on other prospective jurors with whom he felt uncomfortable. IB at 83. However, prejudice, in the context of jury selection, means that a biased juror remained on the final jury, not a juror with which Peterka was "uncomfortable". Uncomfortable is not biased and does not amount to prejudice.

Prospective juror Parker never sat on the jury because he was stricken peremptorily by trial counsel. IB at 80-81.[49] There

[49] Prospective juror Parker stated that he would follow the law. (T. 496). Moreover, he repeatedly stated that he understood that the death penalty was not automatic even if

can be no prejudice regarding a prospective juror that never sat on the final jury.[50] This same analysis applies to prospective juror White and prospective juror Watson, both of whom, also did not sit on the actual jury. IB at 81-82.[51] The trial court's characterization of aggravating circumstances as those "above and beyond normal" is perfectly proper. (T. II 398). Moreover,

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Peterka was guilty of premeditated murder. (T. 487-490).

[50] Collateral counsel views peremptory challenges as an independent right. They are not. Peremptory challenges are a fail safe system designed to cure the judge's erroneous denial of a challenge for cause. Peremptory challenges were developed at a time in the common law when appeals were a rarity. They were designed to guarantee fair juries by curing erroneous denials of cause challenges immediately at trial in the absence of appellate review. The only reason peremptory challenges exist is to ensure a fair and impartial jury, they are not a independent right. If a defendant was tried in front of a fair and impartial jury, he may not complain about how he had to get there. *United States v. Martinez-Salazar*, 528 U.S. 304, 318-319, 120 S.Ct. 774, 783, 145 L.Ed.2d 792 (2000)(Scalia, J., concurring)(explaining that normal principles of waiver disable a defendant from objecting on appeal to the seating of a juror he was entirely able to prevent by the use of peremptory challenges and if a defendant had plenty of peremptories left, but chose instead to allow a biased juror to sit on the panel, he has waived any claim of error because one of the purposes of peremptory challenges is to enable the defendant to correct judicial error in relation to "for cause" challenges); *But cf. De La Rosa v. Zequeira*, 659 So. 2d 239, 241 (Fla. 1995). A defendant has no right to any particular number of "free" peremptory challenges, only a right to a fair jury.

[51] Prospective juror Watson clarified his statement about going to a penalty phase that he was not saying that he expected Peterka to be convicted of first degree murder. (T. 915). Moreover, he stated that he would be able to follow the law regarding aggravating and mitigating circumstances. (T. 918-919). Prospective juror Watson, in addition to stating that sometimes self-defense is a cop-out, also stated that an arrest was nothing more than just that and she did not expect to find Peterka guilty and would consider all degrees of murder. (T. 649-650)

any problems relating to the trial court's statements regarding aggravating circumstance during jury selection was cured by the final jury instruction covering aggravating circumstances. IB at 82.

Nor was trial counsel deficient for not further questioning Juror King or the other jurors regarding the firearms. As trial counsel testified at the evidentiary hearing, the firearm issue was "six of one, half a dozen of the other". He felt that jurors who owned a firearm would be good jurors during guilt phase because they would support a self-defense theory; whereas, jurors who did not own firearms would be good jurors during penalty phase. (EH VI 339). Counsel is not deficient for not asking questions that cut both ways. Collateral counsel does not address trial counsel's stated reason for not further questioning the jurors on this issue. This is a tactical choice regarding jury selection that is immune to an ineffectiveness attack.

Nor was counsel ineffective for not asking questions regarding premeditation, burden of proof and reasonable doubt when the prosecutor had already explored these areas with the jurors. There is no reason for both the prosecutor and defense counsel to ask the same questions. Nor is it likely that the trial court would have allowed trial counsel to repeat the same questions of the jurors that the prosecutor had just asked. Therefore, the trial court properly ruled that trial counsel was not ineffective during jury selection.

ISSUE V

DID THE TRIAL COURT PROPERLY LIMIT CUMULATIVE EVIDENCE AT THE EVIDENTIARY HEARING? (Restated)

Peterka next asserts that the trial court improperly limited evidence at the evidentiary hearing. Part of this evidence was cumulative. It had already been presented at trial. Evidentiary hearings are designed to elicit new evidence not presented at trial. The brother was not qualified to testify as to the meaning of Peterka's military commendation. Peterka testified as to its meaning at the evidentiary hearing. Moreover, as the trial court noted, the military commendation speaks for itself. Thus, the trial court properly limited the evidence at the evidentiary hearing.

The trial court's ruling

At the start of the evidentiary hearing, collateral counsel was introducing Peterka's mother. (EH Vol. V 9-10). The prosecutor objected based on relevancy and that the testimony was cumulative because "all of this was testified to in the prior penalty phase." The judge explained that the focus of the evidentiary hearing would be on what could have been presented at trial but was not. Testimony already present was in the record. The trial court restricted counsel from presenting testimony that had previously been present and limited counsel to new testimony. Collateral counsel did not object; rather, he stated: "All right, sir,". (EH Vol. V 10). Ms. Peterka then testified as to the family and the defendant's childhood. (EH Vol. V 20-21). The trial court explained that the testimony was

cumulative but stated if you're going to take five minutes that's fine but the testimony could go for three days on this one question. (EH Vol. V 22). Counsel told the trial court that it probably won't take more than five minutes. The trial court then informed counsel that he felt the testimony was cumulative. Counsel stated that his real point for this witness was her lack of preparation for the penalty phase. The prosecutor then stated that he had no objection to leading questions being asked of the witness. (EH Vol. V 24). The trial court agreed and informed counsel that he could ask leading questions. The trial court stated that "if you have prepared something that's going to get the Court's attention, its time for me to hear it" (EH Vol. V 24). The trial court informed counsel that it was being frank with counsel and that they needed to move on. (EH Vol. V 25). Counsel agreed to move on. The prosecutor on cross, asked Ms. Peterka if she had testified about Peterka's violent nature at trial and the judge immediately interrupted and then told that prosecutor that this was also in the record. The judge then asked counsel "do you guys not believe me? (EH Vol. V 27-28). The judge then asked the prosecutor to move on. (EH Vol. V 28).

Peterka's mother testified at the evidentiary hearing that she never considered bringing Peterka's brother to the trial because he was younger, probably in school and she did not want to expose him to the trial at that age. (EH Vol. V 36-37). Peterka's father testified at the evidentiary hearing that he and his wife decided not to involve the younger children in the

trial. (EH Vol. V 90). While he also testified that trial counsel did not suggest involving the siblings, the questioning focused on Karyn, the oldest daughter, as a potential penalty phase witness. (EH Vol. V 92-93).

Timothy Peterka testified at the evidentiary hearing. (EH Vol. V 110). He was a sergeant in the Unites States Marine Corps. (EH Vol. V 111). He identified Exhibit #4 as a commendation for outstanding leadership from the National Guard. (EH Vol. V 18, 111). The prosecutor objected to this witness' qualifications because the witness was not a member of the Minnesota National Guard. (EH Vol. V 112). The prosecutor noted that the judge had military experience and could give it due weight. (EH Vol. V 112). The trial court sustained the objection explaining that the witness was not qualified as an expert in military decorations. (EH Vol. V 112). The trial court noted that the exhibit itself was in evidence and it was self-explanatory. (EH Vol. V 113). Collateral counsel then proffered that Sgt. Peterka would testify that it means that whoever receives it has done something to stand out and that it was not a common occurrence. (EH Vol. V 113). The trial court accepted the proffer. On cross, Tim Peterka testified that he did not attend the trial because his parents were never told that it was not necessary. (EH Vol. V 118).

Peterka testified as to the meaning of the commendation at the evidentiary hearing. (EH Vol. V 196-198). Mr. Harllee, who was second chair and in charge of the penalty phase, testified that

Peterka told him he did not want his siblings involved. (EH Vol. VI 241).

Preservation

The issue of the limitation on Peterka's mother's testimony at the evidentiary hearing was not preserved. Collateral counsel did not object to the limitation; rather, he agreed with the limitation. Furthermore, when the judge later asked counsel to move on, counsel agreed to do so. Nor did collateral counsel make a proffer of the testimony regarding the background that he thought was being improperly limited. This Court cannot determine if the limitation was proper without knowing exactly what testimony was excluded. *Blackwood v. State*, 777 So. 2d 399, 411 (Fla. 2000)(concluding issue of whether reports where improperly excluded on the basis that they were cumulative was not preserved because no proffer of the reports was made citing *Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990); *Jacobs v. Wainwright*, 450 So. 2d 200, 201 (Fla. 1984) and *Finney v. State*, 660 So. 2d 674, 684 (Fla. 1995)). The issue is not preserved.

Merits

Peterka's mother's testimony was cumulative. It had already been presented at trial. Evidentiary hearings are designed to elicit new evidence not presented at trial. Collateral counsel

mistakenly believes that a judge may not direct collateral counsel in his presentation of evidence at an evidentiary hearing conducted without a jury. When no jury is present, a judge may take charge by asking questions or, as in this case, by directing counsel to get the Court's attention now. This Court routinely directs appellate counsel's attention to certain issues at oral argument. There may be some concern with such directions at trial because a jury is present. A judge who directs and controls an evidentiary hearing is still a neutral and detached magistrate. ***Liteky v. United States***, 510 U.S. 540, 557, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994)(observing "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge" and that "[a] judge's ordinary efforts at courtroom administration -- even a stern and short-tempered judge's ordinary efforts at courtroom administration -- remain immune."). Judges are not robed mummies. ***United States v. Cheramie***, 520 F.2d 325, 327 (5th Cir. 1975)(applauding the judge for his examination of the government's ballistic expert to clarify the expert's testimony to the jury and observing that "a judge is more than a robed mummy presiding at trial"). Furthermore, the judge also interrupted the prosecutor during the cross-examination of mother because the judge thought that the prosecutor's question were also cumulative. (EH Vol. V 27-28). The judge held the prosecutor to the same standard.

Peterka next complaints that the trial court ruled, at the

evidentiary hearing, that his brother was not qualified as an expert in military matters. IB at 83. Peterka's brother was not available at trial. Furthermore, Peterka had instructed penalty phase counsel not to involve the brother. *Porter v. State*, 788 So. 2d 917 (Fla. 2001)(explaining that a defense attorney is not ineffective for following his client's instructions not to speak to members of his family); *Sims v. State*, 602 So. 2d 1253, 1258 (Fla. 1992)(observing that counsel can be considered ineffective for honoring the client's wishes). Any limitation on his testimony at the evidentiary hearing is irrelevant because the brother would not have testified at trial at all. Additionally, as the trial court noted, the commendation was in evidence and was self-explanatory. Moreover, the defendant testified as to its meaning at some length at the evidentiary hearing. (EH Vol. V 196-198). Additionally, the judge was an "old military fellow" himself. (EH VI 286). Thus, the trial court properly limited the evidence.

Peterka's reliance on *Holland v. State*, 503 So. 2d 1250, 1252 (Fla. 1987), is misplaced. *Holland* held that the erroneous denial of the right to an evidentiary hearing can never be harmless error for "the self-evident reason that a reviewing court does not know what that evidence would be." Here, by contrast, an evidentiary hearing was conducted.

Peterka's reliance on *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994), is equally misplaced. *Easter* concerned whether an issue was procedurally barred from federal habeas review due to the state's total lack of post-conviction proceedings, not the

admissibility of evidence at an evidentiary hearing. The Eighth Circuit did not hold that the state's post-conviction proceedings were a violation of due process; rather, they merely held that the federal habeas review was appropriate in these circumstances. *Easter*, 37 F.3d at 1346 ("While Arkansas' post-conviction procedures . . . are not in themselves constitutionally infirm, the question is whether they are adequate to foreclose Easter's federal habeas corpus petition."). Thus, the trial court properly limited the evidence and testimony at the evidentiary hearing.

ISSUE VI

WHETHER COLLATERAL COUNSEL WAS INEFFECTIVE? (Restated)

Peterka asserts his collateral counsel was ineffective during post-conviction litigation due to lack of communication and for failing to present certain evidence at the evidentiary hearing. He asserts on appeal that his attorney had a conflict of interest because he had filed a bar complaint against collateral counsel. There is no right to effective assistance of collateral counsel. Nor is there any right to conflict-free collateral counsel. Furthermore, lack of communication is not a conflict of interest. Nor does filing a bar complaint create an actual conflict. Conflict of interest is a legal term of art limited solely to situations involving multiple clients. Furthermore, Peterka waived any right he had to conflict-free collateral counsel. Thus, the trial court properly handled collateral counsel's motion to withdraw and Peterka's request to dismiss collateral counsel.

The trial court's ruling

Collateral counsel filed a motion to withdraw as counsel because the defendant had filed a bar complaint against him. (Supp. R. Vol. I 177). Collateral counsel asserted that this put him in an "awkward position" and that he did not trust his client and his client did not trust him. (Supp. R. Vol. II 191). During the hearing on the motion, the trial court asked the defendant if he wished to fire his attorney and Peterka responded: "No, Your honor". (Supp. R. Vol. II 201). The trial

court then asked the defendant if he wanted Mr. Harper to remain on the case and the defendant responded: “Yes, your honor” (Supp. R. Vol. II 202). The defendant, after speaking with collateral counsel, stated that it “would be absolutely satisfactory to me to have Mr. Harper continue on as retained counsel.” (Supp. R. Vol. II 205). Collateral counsel then withdrew his motion to withdraw. (Supp. R. Vol. II 206). At a later hearing held on February 1, 2001, collateral counsel explained that there were some communication problems partly due to distance and partly due to the prison administration but that Peterka was willing to sign the amended motion which addressed some of the concerns in his *pro se* pleading and was willing to agree to Mr. Harper’s continued representation. (Supp. R. Vol. II 221-223). Peterka then withdrew his request to dismiss his attorney. (Supp. R. Vol. II 223).

Merits

There is no constitutional right to effective assistance of collateral counsel. *King v. State*, 808 So.2d 1237, 1245 (Fla. 2002)(rejecting a claim that postconviction counsel was ineffective because a defendant has no constitutional right to effective collateral counsel *citing Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and *Lambrix v. State*, 698 So.2d 247 (Fla.1996)).

The trial is the main event. While no doubt some times collateral proceedings involve important issues relating to

guilt or innocence, this is not usually the case. Moreover, the matter is better handled by professional requirements for registry counsel than by creating a constitutional right to collateral counsel which would merely create another layer of review with its attendant delays.

Peterka's reliance on *Arbelaez v. Butterworth*, 738 So. 2d 326, (Fla. 1999), and *Peede v. State*, 748 So. 2d 253, 256, n.5 (Fla. 1999), is misplaced. His reliance on couple of unpublished orders from this Court is equally misplaced. This Court's comment in a footnote in *Peede* regarding the poor quality of the initial brief in a particular case does not create a constitutional right to collateral counsel. Nor do unpublished orders. Furthermore, both cases and both orders predate *King*, *supra*, wherein this Court reaffirmed its long-standing position that there is no constitutional right to collateral counsel.

Furthermore, lack of communication or difference over strategy are not "conflicts of interest". Conflicts of interest claims are limited to multiple client situations. *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002)(explaining that ethical conflicts, such as book deals and romantic entanglements, are governed by *Strickland*, not *Cuyler*). Counsel being in an "awkward position" or a lack of trust between the attorney and client is not a conflict of interest. (Supp. R. Vol. II 191). Florida Courts have noted that filing of a bar complaint does not create an actual conflict of interest. *Boudreau v. Carlisle*, 549 So.2d 1073 (Fla. 4th DCA 1989)(holding that the trial court is not obligated to grant a motion for

substitute counsel based merely on the filing of a bar complaint). Moreover, to the extent that any conflict of interest existed, Peterka waived it. *Larzelere v. State*, 676 So.2d 394, 403 (Fla. 1996)(noting that the right to conflict-free counsel may validly be waived citing *United States v. Rodriguez*, 982 F.2d 474 (11th Cir. 1993)). Peterka withdrew his motion and agreed to Mr. Harper. Thus, the trial court properly handled collateral counsel's motion to withdraw and Peterka's request to dismiss collateral counsel.

Peterka draws some inference regarding retained counsel's decision to rely on many of the same facts and claims in the amended motion as original collateral counsel presented in the original motion. IB at 93. Partial reliance on prior counsel's work is a sign of effective counsel. Two legal minds are better than one. Peterka asserts that his collateral counsel was ineffective at the evidentiary hearing for not presenting: (1) *Skipper* evidence of his refusal to participate in an escape[52]; (2) failing to present the testimony of a childhood friend, Mr. Sachs and Sachs' mother; and (3) alcohol abuse. IB at 93-97. Collateral counsel, in a footnote, requests that a second evidentiary hearing be held to present this testimony. IB at 99 n.12. None of this evidence is compelling and the request highlights the problem with creating a constitutional right to collateral counsel. If such a right is recognized, all capital cases will now become a three step process - a trial, an

[52] *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

evidentiary hearing regarding trial counsel's performance, a second evidentiary hearing regarding collateral counsel's performance which each step being reviewed by this Court (and later the federal courts in habeas review). Thus, the trial court properly handled the issue of collateral counsel.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Linda McDermott, McClain & McDermott, 497 Stonehouse Road, Tallahassee, FL 32301 this 30th day of September, 2003.

_____
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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12 point font.

_____
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