IN THE SUPREME COURT OF FLORIDA

RICHARD EUGENE HAMILTON,

Appellant,

v. Case No. SC02-1426

STATE OF FLORIDA,

Appellee,
_____/

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

ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

GARY MILLIGAN
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 059617

OFFICE OF THE ATTORNEY
GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
(850) 487-0997 (FAX)

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

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

The record on appeal from the Defendant's direct appeal will be referenced as (R.) followed by the appropriate page number. The record of appeal from the post-conviction proceedings will be referenced as (PCR.) followed by the appropriate volume and page number, except as to the volumes which comprise the evidentiary hearing held by the trial court. The volumes containing the evidentiary hearing (numbered VI and VII) will be referred to as (EH.) followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS FROM THE TRIAL

The Defendant was charged by indictment along with his co-defendant, Anthony Floyd Wainwright, with First Degree Murder, Armed Robbery, Armed Kidnapping, and Armed Sexual Battery. (R. 2671-72). The Defendant and co-defendant were tried in a single trial with two juries.

Guilt Phase

At trial, the State introduced evidence demonstrating the

Defendant's guilt beyond a reasonable doubt. Prior to April 24, 1994, the Defendant and co-defendant were prisoners at the Carteret Correctional Center in Newport, North Carolina. (T. 339-341). On that date, the Defendant, while on grounds keeping duties outside of the perimeter fence, escaped with the co-defendant. (R. 340-344).

The Defendant and co-defendant then began a crime spree ranging through North Carolina, Florida and Mississippi. First, on the day they escaped from prison the Defendant and co-defendant stole a green Cadillac from in Maysville, North Carolina. (R. 348-350). The following morning they proceeded to Pinetops, North Carolina where they stole firearms from Victor Henderson's home. (R. 355-366). The guns they took included, among others, a Winchester .30-.30 rifle and Remington single shot .22 rifle. (R. 358-359). The defendants also stole ammunition for the weapons. (R. 359-360).

The defendants eventually worked their way south, and were in the Daytona Beach area at one point. When they left, they headed west until their Cadillac overheated in Lake City, Florida on April 27, 1994. There they pulled into a Winn Dixie looking for another vehicle. (R. 903). What they found was the victim, Carmen Gayheart and her Ford Bronco.

Mrs. Gayheart was a student attending classes at Lake City

Community College. (R. 376). On April 27, 1994, she met with her friend, Jennifer Smith, after class and they ran errands during lunch. (R. 376-377). Mrs. Gayheart was dressed in a pink T-shirt, blue jean shorts with pink trim and white socks and tennis shoes. (R. 377).[1] Ms. Smithhart testified that they returned to campus at approximately 12:15 p.m., because Mrs. Gayheart needed to pick up her kids from the daycare center by 12:30 p.m. (R. 383). Mrs. Garyheart never arrived at her children's daycare center.

Before picking up her children, Mrs. Gayheart must have stopped at Winn Dixie to buy some grocery items because according to the Defendant's confession, he and the co-defendant encountered her when they stopped at the Winn Dixie looking for a vehicle to replace their overheated Cadillac. (R. 637-638).

According to the Defendant's confession, the water pump on the Cadillac the defendants stole in North Carolina had broken and they were driving around looking for another vehicle. (R. 637-638). They spotted the victim coming out of a Winn Dixie supermarket and followed her to her Bronco. (R. 638). The co-defendant forced Mrs. Gayheart into her Bronco at gunpoint, and

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[1]/ At trial, Ms. Smithhart identified the trim from bottom of the victim's shorts, as well as the victim's shorts, shoes, socks, and earrings which were discovered by police. (R. 379-382).

the Defendant followed in the Cadillac. (R. 638). They ditched the Cadillac, transferred all their weapons and ammunition to the Bronco, and then drove off. (R. 639).

The Defendant stated in this confession that he and the co-defendant discussed the fact that the victim had seen their faces and the co-defendant said he was going to kill her. (R. 639). According to the Defendant, Mrs. Gayheart told them that she had two children, a boy and a girl, ages 5 and 3, and begged the defendants not to hurt her. (R. 641). Instead, the Defendant and the co-defendant raped the victim. (R. 639, 908). Then the co-defendant took her outside the Bronco, tried to strangle her to death and shot her twice in the head with the .22 caliber rifle. (R. 639-640). The Defendant believed that the victim was dead before she was shot because the co-defendant strangled her with a green T-shirt. (R. 639).

After the co-defendant shot Mrs. Gayheart, her body was dragged into the trees. (R. 639-640). The defendants then drove off and later discarded Mrs. Gayheart's clothing, jewelry and purse. (R. 645). The Defendant said that he threw the .22 caliber rifle out the window not too far from the murder scene. (R. 642-644, 645).

The defendants then proceeded westward until they were in Mississippi. In Mississippi, the defendants were spotted

driving the Bronco by Mississippi State Trooper John Leggett. (R. 400-402). Trooper Leggett testified that on April 28, 1994, he saw a blue Bronco with very dark tinted windows driving in Lincoln County. (R. 400-402). He called the tag into his dispatcher to run a check (R. 403), and observed that the driver of the Bronco was speeding 50 mph in a 40 mph zone. (R. 403). Trooper Leggett then attempted to stop the car. (R. 404).

When the trooper tried to stop the Defendants, the co-defendant (the driver) attempted to outrun and elude the trooper. (R. 404, 409). Trooper Leggett gave chase, but as he closed on the defendants, the rear window of the Bronco was rolled down and the Defendant (the passenger) pointed a gun at the trooper and started shooting. (R. 404-405, 409). During the course of the five to ten minute chase, each time Trooper Leggett tried to close on the defendant's vehicle, shots would be fired at him.

The chase ended when the co-defendant turned onto a dead end street at the Eva Harris School. (R. 411). Realizing that they were trapped in a dead end street, the defendants turned and drove back towards the trooper who had set up his car blocking the exit. (R. 413). As the defendants raced back towards the trooper, it looked as if they were going to ram his car. (R. 413-414). The trooper fired four shots from his shotgun at

them. (R. 413). The defendants swerved, struck the corner of the trooper's car, lost control of the Bronco and hit a tree. (R. 413-414).

When the Defendant got out of the Bronco, he was carrying a shotgun and trying to load a shell. (R. 415). Trooper Leggett shot at the Defendant, hitting him. (R. 415). The co-defendant also came out of the car and ran off into the woods (he was later caught by other officers). (R. 416). As a result of the exchange of gunfire, the Defendant received a grazing wound to his forehead and an upper arm wound. (R. 428).

Trooper Leggett later saw the Defendant at the jailhouse and spoke with him at the Lincoln County Jail. (R. 449). The Defendant had shaved his head and said that he was ready to meet the consequences of his actions and had been helped by turning to the Lord. He apologized to Trooper Leggett for shooting at him and said that he shot at the officer hoping that he would back off because if the Trooper had stopped them, they were going to kill him. (R. 450).

After the defendants were in custody, the police searched the Bronco and discovered the stolen 30-30 rifle and shells along with 12 gauge shotgun shells. (R. 510). One of the victim's gold earrings was also found in the Bronco. (R. 512).

After his arrest, the Defendant gave several statements to

the police. First, while hospitalized in the Lincoln County King's Daughter's Hospital for the gunshot wounds he received from Trooper Leggett, Columbia County Sheriff's Investigator Russ Williams met with Hamilton and advised him of his constitutional rights. (R. 630-634).

As set forth above, the Defendant admitted that the Cadillac's water pump broke near Lake City (R. 637-638), that he and the co-defendant abducted the victim and took her Bronco (R. 638), that they raped her, and that the co-defendant strangled and shot her. (R. 639). The statement was taken on April 29, 1994, and it was taped and transcribed. (R. 634-635).

The Defendant also gave a statement to Agent Robert Kinsey of the FDLE, following additional Miranda warnings. (R. 888-896). During the course of this more detailed statement to Agent Kinsey, the Defendant admitted that he tried to calm the victim and told her that they needed her vehicle. (R. 907). The Defendant admitted that it was he who first required Mrs. Gayheart to disrobe and he first sexually assaulted her in the back of the Bronco. (R. 908). However, the Defendant confirmed that when he finished, the co-defendant was with her in the back of the Bronco for 20 minutes. (R. 908).

After finishing, the co-defendant told the victim to get out of the Bronco. The co-defendant then made the victim walk about

ten feet from the Bronco and lay face down on the ground. (R. 908-910). The co-defendant then strangled the victim with a t-shirt. (R. 910). The Defendant told Agent Kinsey that he believed the victim was killed by strangulation. (R. 910). The co-defendant told the Defendant that he had "killed her, I finally killed one." (R. 911). The co-defendant then took the .22 caliber rifle and shot the victim twice in the head. (R. 912). The Defendant also confessed that he helped move Mrs. Gayheart's body into the woods and that he put limbs and leaves over her. (R. 912).

In addition to the statements that the Defendant gave to the police, he also ultimately agreed to return to Florida to assist the police in finding Mrs. Gayheart's body. (R. 647). With the Defendant's help, Mrs. Gayheart was found on May 2, 1994. (R. 647-649). The Defendant also assisted in helping locate the .22 caliber rifle used to shoot her. (R. 665).

However, at the same time the Defendant was giving statements to the police and agreeing to return to Florida to assist in the search for the victim, the Defendant was also planning an escape from the jail in Mississippi where he and the co-defendant were being held. The Defendant acquired a diagram of the jail and wrote a letter to the co-defendant detailing how they could escape and kill the jailor. (R. 556-560, 684-686,

689-699).

The State also presented forensic evidence in the form of DNA, ballistics and fingerprint evidence. First, two deposits of sperm and other DNA were found on the seat cover of the victim's Bronco.[2] (R. 1620). The first sample was consistent with the DNA profile of the Defendant and the victim. (R. 1620). The second sample was consistent with a mixture of the Defendant and the co-defendant's DNA as well as the epithelial fraction being consistent with the victim's DNA. (R. 1620). According to the State's expert, Dr. DeGuglielmo, the frequency of the Defendant's DNA profile was one in 6,158, meaning that the probability of the DNA coming from someone else was about .04 percent. (R. 1621).[3]

The State also presented ballistics evidence. A spent .22 caliber Super X cartridge was found near where the victim was shot. (R. 810, 820). The State's firearm expert confirmed that the casing came from a bullet fired by the .22 caliber rifle

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[2]/ According to the Medical Examiner, the body was too decomposed to show signs of sex battery or find semen. (R. 875-876).

[3]/ Just after the introduction of the DNA evidence, Hamilton County Sheriff Harrell Reid was called to the stand to testify that during the trial the Defendant turned to him and said, "Sheriff, what's the need for all this DNA mess, we both raped her." (R. 1659).

used to shoot the victim. (R. 1185). There were also bullet fragments removed from the victim's brain and the back of her head. (R. 841-842). The State's expert confirmed that the rifling on these fragments matched the same .22 rifle which the Defendant had assisted police in finding and which he had identified as the weapon used to shoot the victim after she was strangled. (R. 1189-1194).

Finally, the State also presented fingerprint evidence. Prints found in the Bronco matched the Defendant and co-defendant. (R. 1710-1711). Also both defendant's prints were found on the 30-30 rifle which was stolen at the same time the .22 caliber rifle was stolen. (R. 1715). Additionally, their prints were found on two Winn Dixie bags found near the victim's body. (R. 1722-24, 1728-1730). Following the admission of fingerprint testimony, the State rested its case. (R. 1747).

The Defendant presented a number of witnesses in the defense's case. Specifically, the defense called Dennis Givens and Bill Bispham, inmates who were confined with the co-defendant. (R. 1760-1765, 1780-1781). Both men testified that the co-defendant had described the crime spree consistent with the Defendant's confession. Each prisoner said that the co-defendant had taken sole credit for the killing, although they differed in whether the co-defendant admitted to raping the

victim. However, it was both witnesses' impression that the co-defendant was trying to impress them. (R. 1765-1798). The defense then rested. (R. 1798).

The State presented a rebuttal case. First, the State called Robert Murphy, a prisoner who had been in disciplinary confinement with the co-defendant. (R. 1798). Murphy testified that the co-defendant told him, "I strangled her." (R. 1800). The State then impeached Murphy based on a prior statement he made in which he claimed that the co-defendant said to him, "***We*** strangled her." (emphasis added). (R. 1800-1802).

Finally, the State called Deputy Mallory Daniels, who had interviewed the co-defendant. (R. 1817). The co-defendants' statement to Deputy Daniels varied from the co-defendant's statement to his fellow prisoners, Givens and Bispham. In his account to the deputy, the co-defendant claimed that the Defendant took the lead, deciding which cars and guns to steal, deciding to abduct the victim, and directing the co-defendant. He also claimed that the Defendant was the only one who raped the victim and that it was the Defendant who killed the victim. (R. 1817-1824).

The jury found the Defendant guilty as charged on all counts. (R. 3879-81).

<u>Penalty Phase</u>

The case then proceeded to the penalty phase. The State called no witnesses during the penalty phase. Instead, it introduced a May 11, 1989 commitment order from North Carolina wherein the Defendant was found guilty of robbery with a dangerous weapon and common law robbery. (R. 2067). The State also introduced a copy of the plea from Mississippi dated September 9, 1994, where the Defendant pled guilty to aggravated assault upon a law enforcement officer. (R. 2068). The State then rested. (R. 2069).

The defense presented three witnesses during the penalty phase. First, the defense called Donnie Simmons, the Defendant's mother's first cousin, who had known the Defendant since he was a baby. (R. 2070-2071). Mr. Simmons testified that the Defendant was one of three children, and he grew up in Greenville, North Carolina in a poor neighborhood called Meadows where drugs were sold. (R. 2072). The Defendant went to elementary school and attended Adcock Junior High School.

Mr. Simmons testified that the Defendant's childhood was not easy due to the neighborhood and the drugs that were sold there. (R. 2073). The Defendant's father worked the night shift and his mother worked part-time, although she suffered from nervous problems and back problems. (R. 2073). According to Mr. Simmons the family was not a very stable one since the mother

was on lots of medication and the father had to work. (R. 2074). Mr. Simmons did admit, however, the Defendant received plenty of love from the parents. (R. 2074).

According to Mr. Simmons, the Defendant and his brother Timothy got into a lot of trouble (R. 2075), but the Defendant also demonstrated a helpful nature in assisting his grandparents in their store. When the grandparents moved out of the neighborhood, the Defendant helped bring food and visited. (R. 2076-2077).

Mr. Simmons also testified that, when the Defendant was 9 years old, he experienced a severe trauma as the result of getting shot in the eye with a BB gun by another kid. (R. 2077). His eye was ultimately removed a couple of years later following a number of surgeries. (R. 2078). It was Mr. Simmons' view that after this incident the Defendant got in with the wrong crowd. (R. 2079).

The second witness called during the penalty phase was the Defendant's brother, Timothy Hamilton. (R. 2081-2083). Timothy Hamilton stated that he was 35 years old, married and had 2 children. Timothy Hamilton confirmed that the neighborhood they grew up in was drug-infested and it was easy to get involved with the wrong crowd. (R. 2083). He testified that the family situation was dysfunctional in that no one got along and,

although everyone loved each other, there was never any peace and a lot of bickering. (R. 2084). Timothy Hamilton also claimed that his mother was in poor health and always on medication and that it was his father who provided the stability in the household. (R. 2084-2085).

Timothy Hamilton testified that he and the Defendant were always getting into trouble. He said that they used drugs and alcohol at an early age and that the Defendant had become involved in drugs and alcohol in his early teens. (R. 2085). He also stated that they ran away from home a number of times and that both he and the Defendant were rebellious. He claimed that their younger sister had also gotten into trouble but she managed to straighten out her life. (R. 2086).

According to Timothy Hamilton, when his brother lost his eye, he went into a depression and went off into his own world. At this point the Defendant started to get into trouble with the juvenile authorities (around age 11 or 12), and he started stealing.

Timothy Hamilton characterized their childhood as sad and chaotic. (R. 2087). Timothy Hamilton admitted that he loved his brother and there had been a loving relationship between the parents. (R. 2088). He observed that his brother had good qualities and that he helped his grandparents. (R. 2088).

Timothy Hamilton also believed that although they both went wild, it was they community where they lived that was to blame for what they did. He said they had no choice as to their conduct. (R. 2089).

On cross-examination, Timothy Hamilton admitted that he had changed his life around after serving 7.5 years in prison and that he now had a stable life with a family and children. (R. 2090).

On redirect, Timothy Hamilton admitted that he and his brother fought with their mother and that she once had tried to shoot him and his brother. (R. 2090-2091). He observed that his mother loved the Defendant too much and that his mother caused a number of problems. According to him their mother was a dominating-type person and, although Timothy broke away, the Defendant never quite overcame his mother's control. (R. 2092-2095).

As the third and final penalty phase witness, the defense called Ann Baker, who testified that she had known the Defendant since he was 17 or 18 years old when he was dating her daughter. (R. 2095-2096). After the Defendant and her daughter broke up, Mrs. Baker did not see him again until 1988 when he came to work for her husband in their paint store. (R. 2098-2099).

According to Mrs. Baker, the Defendant was a good worker and

very respectful. (R. 2099-2100). She observed that the Defendant's family was always in turmoil and did not get along. (R. 2102). She also claimed that the Defendant had told her that he wished her husband was his father because he had a lot of respect for him. She testified that her husband used to take the Defendant fishing and they did other things together. (R. 2102-2103).

Mrs. Baker also observed that the Defendant had an odd relationship with his mother and that his mother was domineering, jealous and protective of him. (R. 2104). Mrs. Baker recalled how the Defendant's mother had Mrs. Baker's daughter arrested for trespassing because she wanted to break them up. She also recounted how the Defendant's mother was a negative influence in his life and wanted control. She further testified that the Defendant loves his family and is a caring person and respectful. (R. 2107).

The jury voted that the Defendant should be sentenced to death by a vote or 10-2. (R. 4106). The trial court then sentenced the Defendant to death. In imposing that sentence, the trial court found the following applicable aggravators-

> 1. The Defendant was already under a sentence of imprisonment.
>
> 2. The Defendant was previously convicted of another felony involving the use or threat of violence- aggravated assault on a law enforcement officer and

two prior robberies.

3. The murder was committed during the course of a robbery, sexual battery and a kidnapping.

4. The murder was committed to avoid arrest.

5. The murder was especially heinous, atrocious or cruel.

6. It was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 4121-4124).

The trial court found no applicable statutory mitigators. (R. 4124-4126). The trial court noted that it had instructed the jury on the statutory mitigators of (a) being an accomplice with relatively minor participation and (b) being under extreme mental duress or the substantial domination of another person. (R. 4125). However, the trial court rejected the application of both mitigators. (R. 4125). As to non-statutory mitigation, the trial court found-

> The defendant presented testimony relating to his rearing in a drug-ridden, crime-infested neighborhood, his mother's mental illness, his suffering of various childhood traumas, including his loss of an eye in a B-B (sic) gun accident, and his gainful employment and good work habits. The Defendant also argued his assistance to the authorities in the location of the body of Carmen Gayheart. (R. 4126).

The trial court afforded these mitigators little weight. (R. 4126).

The Defendant appealed his conviction and sentence. On direct appeal, the Defendant raised nine issues. This Court fully affirmed the Defendant's conviction and sentence in Hamilton v. State, 703 So.2d 1038 (Fla. 1997).

Post-Conviction

The Defendant then began his post-conviction litigation leading to the filing of his Second Amended Petition for Relief Pursuant to Florida Rule of Criminal Procedure § 3.851. (PCR. I 112-137). The State responded (PCR I 138-158) and a hearing was held pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) (PCR. V). At the Huff hearing, the trial court determined that issues 1, 2, 6, 7, and 11-18 should be summarily denied while an evidentiary hearing should be held as to issues 3, 4, 5, 8, 9 and 10. (PCR. I 177-180).

The evidentiary hearing was held on February 19-20, 2002. (PCR VI & VII). The evidence presented therein will be discussed below. Following the evidentiary hearing, the trial court denied the all of the remaining issues in the Defendant's post-conviction motion. (PCR II 301-305). The Defendant has now appealed the trial court's denial to this Court.

STATEMENT OF FACTS FROM THE EVIDENTIARY HEARING

Per the trial court's order, the Defendant was permitted an

evidentiary hearing on six issues-

> 1. Why trial counsel did not call Defendant's father and sister to testify in person at his suppression hearing,
>
> 2. Why trial counsel allowed Defendant's jury to remain in the courtroom during Trooper Leggett's cross-examination by the co-defendant,
>
> 3. Why trial counsel did not question Defendant's jurors about whether they overheard testimony when they were not in the courtroom,
>
> 4. Whether trial counsel was ineffective in his presentation of mitigating evidence during the penalty phase,
>
> 5. Whether trial counsel was ineffective for not investigating whether certain jurors discussed the case among themselves prior to deliberation, and
>
> 6. Whether trial counsel was ineffective in using the retained psychiatrist.

(1)

On the first issue, regarding trial counsel's decision to not call family members to testify at the Defendant's motion to suppress, collateral counsel presented testimony from the Defendant's father, mother, sister and trial counsel. As to this issue, the family members testified they were aware that the Defendant had escaped from prison in North Carolina. (EH. 80). In fact, the mother was aware that the Defendant had made his way to Florida. (EH. 80). After the escape, the mother went to Jacksonville to find him, but he had already left. (EH. 80).

The family members then heard that the Defendant had been captured in Mississippi and the father, mother and sister went there. (EH. 25, 47, 80). They first saw the Defendant when he came from surgery (EH. 26) and, according to the sister, he appeared to be sedated and his face was stitched up from his injuries. (EH. 29).

At this point, the family claims that they were spoken to by a Detective Williams. Each family member's recollection varies, however, regarding what the detective said. The sister recalls Detective Williams telling her that he thought the Defendant had nothing to do with the shooting and that he wanted to help him. (EH. 28). The sister testified that the detective was asking the family to assist in getting the Defendant to cooperate, so that he would never step foot on death row. (EH. 28).

The father was also present when Detective Williams talked to the family. However, he recalls the detective only saying that if the Defendant cooperated if would be easier on him. (EH. 48). According to the father, the Detective's statement was not made in the Defendant's presence, and he never had a chance to convey the statement to the Defendant. (EH. 49). The father did tell the Defendant to cooperate and come to Florida to do what

he had to do. (EH. 50). However, he explicitly said that he asked the Defendant to cooperate out of respect for the family, and not because the Detective had told him it would make things easier for the Defendant. (EH. 50).

The mother, in turn, recalls Detective Williams telling her that if the Defendant helped the police, it would go easier for him and he would never see death row. (EH. 83). Unlike the other family members, the mother claims that these statements were made in the Defendant's presence. (EH. 84-85). The mother also recalls making several statements to the Defendant saying that if the victim had been her daughter she would want to know where her body was in order to bury her, and that it would better for him to confess. (EH. 85). The mother testified that after the detective asked her to help, she called the Defendant and told him that the victim looked like his sister, that he should be protective of the victim as if she was his sister, and that he should help find her so that she could be buried. (EH. 89-90).

Trial counsel, now Judge, Jimmy Hunt was also called to testify as to this issue. (EH. 164). Trial counsel, a 27 year veteran of the Public Defender's Office, handled his first death penalty case in 1973 and has tried 15 death cases and handled many more. (EH. 182). Trial counsel was assisted in his

preparations by co-counsel David Valin. (EH. 165, 182). Mr. Valin helped review the case, was a liaison with the Defendant, assisted in planning strategy and acted as a sounding board. (EH. 165-166). However, co-counsel Valin was new to the public defender's office and trial counsel had almost exclusive responsibility for both the guilt and penalty phases of the trial. (EH. 165-166).

Regarding the hearing on the motion to suppress, trial counsel testified that he decided to offer the depositions of the family members instead of their live testimony for a variety of tactical reasons. (EH. 170-173). Trial counsel specifically testified that the depositions contained all of the positive testimony that he knew the family members could offer, but would avoid potential contradictions with their prior statement and other family members' testimony. (EH. 172). Trial counsel noted that the Defendant had confessed to his sister during post-arrest phone conversations and that he had described the crime in letters to her. (EH. 172). The sister also admitted that she had told the prosecutor in a deposition that the Defendant had made incriminating statements to her. (EH. 37-39). Trial counsel knew that the sister was out-of-state at the time of the trial and that the State had not subpoenaed her. (EH. 172-173). Trial counsel was concerned that if she came to the suppression

hearing, the State would be able to require her to be a witness for them. (EH. 172-173).

In addition to these tactical concerns, trial counsel was also worried because the family was not cooperating. The sister first testified that she would have come to the suppression hearing if asked to come. (EH. 30-31). However, under questioning from the State, the sister admitted that she told trial counsel she did not want to come and testify because she was pregnant and had previous miscarriages. (EH. 41-43). She was told by trial counsel that he would use her deposition instead. (EH. 43).

The father was asked to come, however, he called trial counsel claiming that his wife would not come and that he no longer wanted to come. Eventually, the father showed up but he was so mad that trial counsel decided not to use him. (EH. 206).

As to the mother, trial counsel testified that he had concerns about her testimony because she has on-going mental health problems. (EH. 103-104). The mother actually denies that her problems are mental health related, instead referring to them as “nerve problems” or a “nervous disorder”. However, she has been treated in in-house programs at Cherry Mental Hospital and Pitt County Memorial Hospital. (EH. 108-110). At the time of the evidentiary hearing, she was taking the following

medications - morphine, neurontin, lorazepam, and zoloft. (EH. 104-106). She also admits to having been on valium, darvocet and others. (EH. 111).

The Defendant's mother was also being treated at the time of the Defendant's trial and motion to suppress. She testified that she did not attend the hearing or trial because her psychiatrist forbid it and threatened to have her committed if she attended. (EH. 92, 103, 107).

Finally, the State's cross-examination of trial counsel also revealed that the Defendant himself had made statements to trial counsel which undermined his own motion to suppress. Trial counsel testified that Defendant told him the police only offered to let the State Attorney know if he cooperated. (EH. 195-196). The Defendant also told trial counsel that he agreed to show the police where the body was located and that he did not feel threatened by the police. (EH. 196). The Defendant did not mention any other promises, and he said he was promptly read his rights at the hospital, although he was shot full of pain killers and medications. (EH. 197). However, given the Defendant's statements and the opinions of Dr. Mhatre, there was no question that the Defendant knew his rights. (EH. 198-199).

Trial counsel also testified that the Defendant told him he

had decided to confess because he thought being caught in the victim's vehicle would be enough to convict him, and he assumed that the body would be found anyway. (EH. 197-198).

(2)

On the issue of trial counsel allowing the Defendant's jury to remain for the cross-examination of Trooper Leggett by the co-defendant, post-conviction counsel presented testimony from trial counsel. Trial counsel testified that it was a conscious, tactical, considered decision. (EH. 177, 202).

According to trial counsel, there were several factors which he took into account. First, trial counsel was aware of the substance of the trooper's testimony from his deposition. (EH. 177). Additionally, the trooper had already given his most damaging testimony during State's direct examination. The Defendant's jury had already heard how the trooper came up behind the victim's Bronco, which the co-defendant was driving and the Defendant was riding in, and attempted to stop them. (EH. 203). The trooper had also testified that a car chase occurred and the Defendant shot a shotgun at him. (EH. 203). However, trial counsel was aware that the Defendant had given the trooper an explanation for shooting at him, which trial counsel determined needed to be put before the jury. (EH. 204). The Defendant had told the trooper that he knew the co-defendant

would kill the trooper if he had pulled them over, so the Defendant shot at the trooper's car to put him on notice. (EH. 204). Trial counsel determined that the only way to get this self-serving hearsay before the Defendant's jury was through the co-defendant's cross-examination of the trooper. (EH. 204). In making this decision he conferred with both co-counsel Valin and the Defendant. (EH. 202). Trial counsel characterized the decision as a judgment call. (EH. 204).

(3)

On the issue regarding how trial counsel handled concerns about whether jurors could hear courtroom discussions when they were in the deliberation room, post-conviction counsel presented testimony from Deputies Slattery and Lowe as well as trial counsel.

Testimony was first taken from Deputy Tom Slattery of the Clay County Sheriff's Office. (EH. 18). Both he and Deputy Donald Lowe, who testified later in the hearing, were volunteer reserve police officers. (EH. 19, 158). The Defendant's trial was the only case in which they served as bailiffs. (EH. 19, 158). Neither deputy could recall anything specific regarding the jury and the courtroom microphones. (EH. 18-22, 157). Deputy Slattery testified that there were two rooms available to the jury, one next to the courtroom and another down the hall.

(EH. 22). Deputy Lowe testified that he did not recall hearing anything from the courtroom while he was seeing to the juries. (EH. 161).

Trial counsel was also questioned regarding his handling of this issue. (EH. 174-175). Trial counsel did not have a detailed recollection of a problem on this issue. However, upon questioning, he responded that such issues were a concern in this case as they would be in any other case, and he did not remember when the issue was raised. (EH. 175-176). He was also asked and recalled that witness Harold Reid had testified 2-3 days prior to bailiff's mention of the microphones. (EH. 174-175). Finally, upon questioning by the State, trial counsel recalled that the attorneys present at the time of microphone issue were himself and his co-counsel Valin, the co-defendant's attorney and a second chair, two Assistant State Attorneys and the trial judge. (EH. 199).

(4)

On the issue of trial counsel's effectiveness in presenting mitigating evidence during the penalty phase, collateral counsel presented evidence from trial counsel, Dr. Mhatre, the Defendant's father, mother, sister, brother and cousin.

The family members testified regarding the Defendant's upbringing. All four immediate family members, the father,

mother, brother and sister, testified that the Defendant had a difficult life.

First, the Defendant's sister testified that their mother attempted to impose discipline but the father did not. (EH. 33). This led to arguments and loud, verbal abuse. (EH. 33). She testified that the Defendant was in prison by the time that she got older, but that she was aware he used drugs or alcohol and that the drugs changed his behavior. (EH. 33-35).

Under questioning from the State, the sister admitted that she had told the prosecutor in a deposition that the Defendant had made incriminating statements to her. (EH. 37-39). She also admitted that trial counsel had meetings with her where they discussed the case and the family background. (EH. 40-41). However, when it came time to testify, the sister told trial counsel that she did not want to come because she was pregnant and had prior miscarriages. (EH. 41-43).

The Defendant's father also testified as to the Defendant's childhood. According to the father, the Defendant's behavior was pretty good until he was shot in the eye with a BB when he was 10 years old. (EH. 51). This required multiple operations, strong medication, and the Defendant eventually lost his eye. (EH. 51-52).

The father explained that while the Defendant was growing

up, he worked 13 years on a graveyard shift. (EH. 53). He said that he was easy going and that the mother was over protective which led to arguments over discipline. (EH. 53-54). The Defendant received spankings but no beatings and both the Defendant and his older brother got into trouble with the law. (EH. 54). According to the father, the Defendant looked up to his older brother and they got into trouble together. (EH. 55).

Under questioning from the State, the father admitted that he had talked with trial counsel on multiple occasions and had discussed the Defendant's childhood. (EH. 57-58). The father gave a deposition March 1995 and trial counsel contacted him a few days before to prepare him. (EH. 58-61).

Next, the Defendant's older brother Timothy Hamilton testified. (EH. 64). The brother called the family dysfunctional and claimed that their father favored the Defendant. (EH. 66). He claimed that their father would also intervene whenever the mother tried to punish the Defendant. (EH. 66-67). The brother confirmed that the Defendant was shot in the eye by a BB when he was 10 years old and that he was on medication for the pain. (EH. 68). The brother also admitted that he got into trouble when he was younger and that he brought the Defendant into it. (EH. 68). There was theft and marijuana

use and although the Defendant was bad before the eye injury and did some drugs before it, he was much worse afterwards. (EH. 69). The mother could not handle them and would often call the father at work over their drug use. (EH. 70). On cross examination, the brother admitted that, unlike the Defendant, his time in prison had caused him to straighten out his life. (EH. 74-76).

The mother, Jewel Neal, then testified. (EH. 78). The mother called the Defendant "BJ", short for "Billy Jack" from the movie. (EH. 79, 100). The name came from a CB handle the Defendant used as a child. (EH. 100). The mother discussed the Defendant as if he is two people - one is the good "BJ" and the other is Richard Hamilton, who does bad things. (EH. 79).

The mother confirmed that she used to argue with the Defendant's father over discipline issues, including sending the Defendant to a detox program as a teenager. (EH. 94-97). The mother also confirmed that the Defendant's loss of an eye from an injury he received when he was 10 years old, and his use of strong pain medication at that time. (EH. 98).

On cross-examination, the Defendants' mother also admitted that she recalls the Defendant pulling a gun on his older brother once, fracturing his brother's shoulder, and pulling a knife on her and putting it to her stomach drawing blood. (EH.

112).

The Defendant's cousin, Donny Simmons, also testified at the evidentiary hearing. (EH. 116). Mr. Simmons confirmed that he had been called for the penalty phase on the Defendant's trial to testify as to these family problems. (EH. 117).

Dr. Mhatre was then called to testify. Dr. Mhatre did not interview the Defendant's family when he rendered his opinion prior to the Defendant's trial. (EH. 141). However, the doctor had examined the family at the time of the evidentiary hearing and he found the family to be dysfunctional. (EH. 141- 144). The doctor testified that he was not asked to consider non-statutory mitigation at the time of the trial, but that he now believes the information about the Defendant's family is "possibly" a non-statutory mitigating factor. (EH. 146).

On cross-examination, the State elicited that Dr. Mhatre had worked with Defendant's trial counsel for over 20 years, he had been retained and testified in penalty phases for other defendants by trial counsel, and he knew what to look for in a death penalty case. (EH. 147-148).

When he was retained in this case, Dr. Mhatre found that the Defendant suffered from antisocial personality disorder. (EH. 148). This is a condition that does not evoke sympathy in juries because it involves manipulative behavior, a pervasive

pattern of lawbreaking and lack of empathy. (EH. 148-149). For these reasons, Dr. Mhatre told trial counsel that his testimony would do more harm than good for the Defendant. (EH. 148).

This statement was also based on the fact that Dr. Mhatre had recently testified on behalf of another defendant who had antisocial personality disorder. (EH. 149). That case involved the same prosecutor who had used Dr. Mhatre to go through the sociopathic characteristics of antisocial personality disorder, and the jury in that case recommended death. (EH. 150).

The state's cross-examination also pointed out that Dr. Mhatre had specifically looked at possible statutory mitigators but had found none to be applicable. (EH. 150). However, the trial court in this case found the statutory mitigator of extreme mental duress to be applicable enough to instruct the jury on it. (EH. 151). Dr. Mhatre stated that his testimony would have refuted that mitigator, and hurt the Defendant's chance to argue for such mitigation. (EH. 150, 152).

Additionally, the non-statutory mitigators that Dr. Mhatre could have testified about would have been the Defendant growing up in drug/crime neighborhood, his mother's mental illness, childhood trauma, and his loss of an eye. (EH. 152). However, all these non-statutory mitigators were found without the doctor's testimony. (EH. 152).

Even with the additional information Dr. Mhatre was provided on post-conviction, he still was of the opinion that his testimony would have done more harm than good because he was of the opinion that the Defendant had little chance of rehabilitation and his condition was permanent with no cure. (EH. 153-155).

Finally, trial counsel was called to testify regarding his decision to not use the Defendant's father, mother, sister, brother or Dr. Mhatre during the penalty phase. Trial counsel's files on the Defendant, including notes of interviews he conducted, were also introduced. (EH. 187-95).

Trial counsel first discussed his reasons for not calling Dr. Mhatre at the penalty phase. Trial counsel testified that he explored the possibility of a mental health defense, however, Dr. Mhatre opined that the Defendant was competent and sane. (EH. 184). The doctor also indicated that there were no applicable statutory mitigators or substantial mitigation in his opinion. (EH. 184). Dr. Mhatre even told trial counsel that he believed his testimony would do more harm than good because it would set aside any doubt about the Defendant's mental faculties and he would have to identify the Defendant as a sociopath. (EH. 185). The belief was that the jury would find this testimony distasteful. (EH. 186).

Trial counsel also discussed his decision not to call the Defendant's father, mother, and sister. As discussed above, trial counsel said that he considered calling the Defendant's family, but that he had concerns about some of the testimony which could be elicited from the family. (EH. 205). The mother had made comments like, there "ain't much mitigation about Richard". (EH. 205). The Defendant had made independent confessions to the sister and the family members would have related that the Defendant had been in trouble since 10 or 12 years old, spending most of his life in reform school, jail and prison. (EH. 205).

Trial counsel was also concerned because he did not receive a lot of cooperation from the family. (EH. 205). Trial counsel said he tried to get the family's cooperation for the penalty phase, but then the mother and her doctor start calling about her mental health, the sister called about her pregnancy, and the father said his wife would not come and he was no longer willing to come. The father eventually did show up but he was so mad that trial counsel decided not to use him. (EH. 206).

Additionally, trial counsel explained that these tactical decisions were discussed with the Defendant who approved of them. (EH. 186). Instead of focusing on the Defendant's background and risking the mixed harm/benefit of Dr. Mhatre's

and his family's testimony, the penalty phase strategy was going to be emphasizing the Defendant's cooperation with the police. Trial counsel indicated that although they would use the Defendant's cousin and brother to present testimony of the Defendant's family background information, they intended to focus on the Defendant's confession to police and assistance in locating the victim's body and the murder weapon. (EH. 186).

(5)

On the issue of trial counsel's handling of allegations that certain jurors discussed the qualifications of the medical examiner prior to deliberations, collateral counsel presented testimony from the Defendant's cousin and trial counsel.

According to the Defendant's cousin, Mr. Simmons, he overheard two jurors discussing the medical examiner's qualifications during a break in the trial. (EH. 118). Mr. Simmons testified that the jurors' conversation gave him the impression that they did not feel the medical examiner was qualified. (EH. 118-119). At the evidentiary hearing, Mr. Simmons also claimed to have overheard one juror saying that the medical examiner did not know what she was talking about. (EH. 118-119).

Mr. Simmons admitted that he informed trial counsel about this incident at the time of the trial and that trial counsel

immediately brought him before the court to testify. However, Mr. Simmons had to admit that he did not give the same testimony to the trial court (during the trial) that he gave at the evidentiary hearing. (EH. 121-124). At the time of trial, Mr. Simmons had indicated that he could not hear the whole conversation, only bits and pieces and that he did not hear the jurors saying anything bad about the medical examiner's qualifications. (EH. 122-123).

Trial counsel only testified that he did not remember asking for voir dire of individual members of the jury. (EH. 179-180).

(6)

On the issue of trial counsel's effectiveness in utilizing the psychiatrist, Dr. Mhatre, collateral counsel presented testimony from Dr. Mhatre and trial counsel.

Dr. Mhatre testified that he was retained in 1995 to examine the Defendant prior to trial. (EH. 137-139). Dr. Mhatre first examined the Defendant on March 15, 1995 at the county jail. (EH. 139). The doctor had received the order to examine the Defendant about the same time. (EH. 139). Dr, Mahatre testified that he examines his patients, including the Defendant until he is done and satisfied. This examination led Dr. Mhatre to opine that the Defendant was sane, competent and presented no

statutory mitigating factors. (EH. 139-140).

Trial counsel testified that the Defendant's trial was originally set for the third week in March, 1995. (EH. 166). Trial counsel first began speaking to Dr. Mhatre about evaluating the Defendant on March 9, 1995. (EH. 166-167). However, trial counsel's notes indicate that Dr. Mhatre may have been assigned to the case before that date. (EH. 166-167). The trial did not take place until May 19, 1995.

Additionally, trial counsel recalled discussing the Defendant's family background with various family members in May 1995 and October 1994, however, he did not recall whether this information was conveyed to Dr. Mhatre. (EH. 168). Trial counsel did recall that he had delivered medical records to Dr. Mhatre. (EH. 169).

In addition to these statements, the testimony of both Dr. Mhatre and trial counsel regarding potential testimony in the penalty phase (discussed fully in section #4) is applicable to this issue. However, as it is fully set forth above, it will not be duplicated here.

SUMMARY OF THE ARGUMENT

The Defendant first claims that his trial counsel was ineffective in the way he made use of the mental health expert, Dr. Mhatre. However, the testimony at the evidentiary hearing refutes this argument because trial counsel made a tactical decision not to call Dr. Mhatre because his diagnosis was harmful. Furthermore, the claims that trial counsel was ineffective because he retained Dr. Mhatre only shortly before trial and because he did not have the doctor interview the family or look at non-statutory mitigation are also refuted. The evidence demonstrates that the trial occurred substantially after Dr. Mhatre was retained, and that even after interviewing the family and looking at non-statutory mitigation on collateral review, the doctor's opinion was the same, i.e. that he would have done more harm than good.

The Defendant's second claim is that his trial counsel was ineffective for failing to call family members to testify at the second motion to suppress instead of using live witnesses. However, the evidence demonstrated that trial counsel made a reasonable tactical decision to use the depositions. First, he knew that everything beneficial that the family had to say was contained within the depositions, and he was concerned that using live testimony would result in conflicts. Second, trial

counsel was also concerned because the witnesses were uncooperative and, could have been used against the Defendant in the trial if available to the State.

The Defendant's third claim is that his trial counsel was ineffective in not trying to use the fact that venue was alleged in Hamilton and/or Columbia County to sever the Defendant from the co-defendant or to sever his other charges from the murder. However, the record makes it clear that trial counsel made a tactical decision to move the trial from either county because of pre-trial publicity. Furthermore, the State would contend that the Defendant could not use the venue issue to sever in the way he is alleging. As such, the Defendant is proposing a novel legal theory and trial counsel cannot be ineffective for not asserting such a theory.

The Defendant's fourth claim is that his trial counsel was ineffective in the way he handled the possibility that the Defendant's jury could have overheard discussions and testimony in the courtroom. The Defendant, however, did not establish that trial counsel's conduct was substandard, that the jury could have heard the in-court conversations or that there was any prejudice because the complained of evidence was later admitted into evidence.

The Defendant's fifth claim is that trial counsel was

ineffective in the way he handled allegations that two jurors were discussing the medical examiner prior to deliberations. The record demonstrates that trial counsel brought this issue immediately to the trial court's attention, but the evidence presented at that time did not indicate any reversible prejudice. Thus, the Defendant failed to prove that trial counsel was ineffective in the way he handled this issue.

The Defendant's sixth claim is that trial counsel was ineffective when he allowed the Defendant's jury to hear the co-defendant's cross-examination of Trooper Leggett. This claim is without merit because trial counsel specifically testified that he allowed the Defendant's jury to hear the cross-examination in order to present a specific self-serving statement which the Defendant made to the trooper, but which they could not have otherwise heard.

The Defendant's seventh claim is that trial counsel was ineffective in not obtaining an independent act jury instruction. The Defendant actually claims that the prosecution offered to let the Defendant have this instruction. However, this is a misrepresentation. Furthermore, there is no indication that trial counsel could have successfully argued for this instruction and, thus, there was no prejudice in failing to obtain it.

The Defendant's eighth claim is that trial counsel was ineffective when he did not call Dr. Mhatre or the Defendant's father, mother and sister to testify at the penalty phase. This claim is without merit because trial counsel made a tactical decision not to call Dr. Mhatre because his testimony would have done more harm than good. Furthermore, trial counsel decided not to call the Defendant's father, mother and sister because they were uncooperative (and this raised concerns about their helpfulness) and their testimony was cumulative of the three other penalty phase witnesses.

Finally, in the Defendant's ninth claim, he argues that his death sentence should be overturned based on Ring v. Arizona. However, based on this Court's decision in Bottoson and the fact that Defendant's sentence was based on recidivist aggravators and the jury's guilt phase finding that the murder was committed during the course of committing other crimes, the Defendant's argument is without merit.

ARGUMENT

STANDARD OF PROOF FOR INEFFECTIVE ASSISTANCE OF COUNSEL

The Defendant's appeal of the denial of his Motion for Post-Conviction Relief consists primarily of ineffective assistance claims. To prove a claim of ineffectiveness, a defendant must prove that counsel's performance was deficient, i.e., "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 687 (1984). A defendant must also demonstrate prejudice, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial." Id. Both parts of this test must be met: "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.; Gudinas v. State, 816 So.2d 1095, 1101-02 (Fla. 2002).

There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. To meet the first part of the Strickland test, therefore, a defendant has the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the complained about conduct was not the result of a strategic decision. Id. at 688-89; Schwab v. State, 27

Fla.L.Weekly, S275, S277 (Fla. March 28, 2002); Stewart v. State, 801 So.2d 59, 66 (Fla. 2000); Cherry v. State, 781 So.2d 1040, 1048 (Fla. 2000). Furthermore, "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." Strickland v. Washington, 466 U.S. at 693. Therefore, to meet the second part of the Strickland test, a defendant must demonstrate "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. at 694; Waterhouse v. State, 792 So.2d 1176, 1182 (Fla. 2001).

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF AS TO HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN REGARD TO THE RETAINED MENTAL HEALTH EXPERT.

The Defendant first claims that his trial counsel was ineffective in the use of Dr. Mhatre, the mental health expert retained prior to trial. Specifically, the Defendant claims that trial counsel was ineffective in retaining the expert only two weeks before the trial was originally scheduled to start, not asking Dr. Mhatre to look at non-statutory mitigators, and not arranging interviews for Dr. Mhatre with the victim's family.

The Defendant's claims are without merit. First, it should

be noted that although Dr. Mhatre was retained at the beginning of March 1995, a few weeks before the *original* trial date, the actual trial did not take place until May 15, 1995. Thus, Dr. Mhatre had over two months to conduct any examination he felt necessary. Furthermore, Dr. Mhatre's testimony at the evidentiary hearing indicated that he had adequate time to examine the Defendant. (EH. 139).

The Defendant also argues that trial counsel did not ask Dr. Mhatre to look for possible non-statutory mitigation nor did counsel arrange interviews with the Defendant's family. However, the testimony at the evidentiary hearing demonstrated that trial counsel was not ineffective.

At the evidentiary hearing, collateral counsel did not put on a new psychiatrist to rebut Dr. Mhatre's original assessment. Instead, collateral counsel had Dr. Mhatre look at possible non-statutory mitigation and interview the Defendant's family. Even so, Dr. Mhatre's assessment of his potential value to the Defendant's defense remained unchanged.

Dr. Mhatre testified that at the time of trial he had worked with trial counsel for over 20 years and he had told trial counsel that his testimony would do more harm than good. (EH. 148). This was based on the fact that Dr. Mhatre's examination revealed that the Defendant was sane, competent, and that no

statutory mitigating circumstances existed. (EH. 140). This assessment may have been made at that time without interviewing the Defendant's family. However, at the time of the evidentiary hearing Dr. Mhatre had done so, and his opinion was unchanged.

Dr. Mhatre indicated that his examination of possible non-statutory mitigation and the Defendant's family history led him to conclude that the dysfunctional nature of the Defendant's background was "possibly" at non-statutory mitigating factor. (EH. 146). However, this factor and the details comprising it -mother's mental problems, drugs, bad neighbor, childhood eye injury- were presented to the jury during the penalty phase and were found by the trial court to be a mitigating factor. (R. 4126). Thus, the Defendant would have gained little by having Dr. Mhatre testify to this sole non-statutory mitigator.

On the other hand, if Dr. Mhatre had testified he would have indicated that the Defendant had antisocial personality disorder which is comprised of the same behavioral problems that sociopaths demonstrate. (EH. 148-149). Antisocial personality disorder involves manipulative behavior, a pervasive pattern of lawbreaking and a lack of empathy. (EH. 149). Dr. Mhatre testified that juries find these conditions distasteful. (EH. 148). Moreover, both Dr. Mhatre and defense counsel had presented this same type of evidence in a trial just before the

Defendant's. (EH. 149). That trial involved the same prosecutor, and the prosecutor went through all the negative sociopath characteristics which the Defendant also exhibits. (EH. 149). The jury in that case recommended death. (EH. 150).

Additionally, because Dr. Mhatre was not called to testify, the Defendant was able to successfully argue that the jury should be instructed as to the statutory mitigator of being under extreme mental duress or the substantial domination of another person. (R. 4125). Dr. Mhatre's testimony at the evidentiary hearing was that he did not believe this statutory mitigator applied to the Defendant, and his testimony would have refuted its application. (EH. 151). He also indicated that if asked on cross-examination he would have had to opine, based on Defendant's antisocial personality disorder, that the Defendant had little chance of rehabilitation and his mental state was permanent with no cure. (EH. 155).

Finally, Dr. Mhatre testified that even after having re-examined the Defendant's case during the post-conviction proceedings, having interviewed the family, and having looked at possible non-statutory mitigation, it was still his opinion that his testimony would have done more harm than good. (EH. 153). Accordingly, Dr. Mhatre's testimony failed to establish that

even if there was some deficiency based on the failure to have him interview the family or look at non-statutory mitigation, it did not create the prejudice required under Strickland. See Carroll v. State, 815 So.2d 601, 611 (Fla. 2002)(This Court found no prejudice where expert witnesses testified at post-conviction evidentiary hearing that even in light of the additional background information provided by collateral counsel, they would have rendered the same opinion).

Trial counsel testified that he made a strategic decision not to have Dr. Mhatre testify. Trial counsel indicated that Dr. Mahtre told him the Defendant knew right from wrong and that his mental state did not mitigate or diminish his culpability. (EH. 184). Trial counsel decided not to have Dr. Mahtre testify because, in his professional opinion, Dr. Mahtre's testimony would not have been helpful or beneficial. (EH. 184-85). Trial counsel discussed this strategy with the Defendant many times, and the Defendant approved. (EH. 185-87).

The type of strategic decision made by trial counsel in this case is exactly the type of situation the United States Supreme Court had in mind when they indicated in Strickland that reasonable strategic decisions of trial counsel should not be second-guessed by a reviewing court. See Strickland v. Washington, 466 U.S. at 689-91. The decision in this case to

not use Dr. Mahtre because his testimony would lead to the jury hearing unfavorable evidence was reasonable. Asay v. State, 769 So.2d 974 (Fla. 2000); Jones v. State, 732 So.2d 313 (Fla. 1999); Rose v. State, 617 So.2d 291 (Fla. 1993). Trial counsel was able to avoid the prosecutor using his cross-examination of Dr. Mhatre to paint the Defendant as a remorseless sociopath. Additionally, without Dr. Mhatre's unfavorable testimony, trial counsel still introduced all the evidence of non-statutory mitigation that Dr. Mhatre could have provided while also securing instructions on the statutory mitigators of extreme duress and substantially impaired capacity that Dr. Mhatre would have refuted. (R. 4165-66).

This Court has previously upheld similar tactical decisions by trial counsel in regard to mental health experts. In Van Poyck v. State, 694 So.2d 686, 692 (Fla. 1997), this Court found that Van Poyck's counsel was not ineffective for deciding not to present the testimony of his expert witness. In Van Poyck, as in the present case, the expert informed trial counsel that he believed the defendant to be a sociopath and asked not to be called as a witness because he would not be helpful. Id; see also Bottoson v. State, 674 So.2d 621 (Fla. 1996)(no ineffective assistance where psychiatrists testimony would not be helpful). Under these circumstances, this Court found that trial counsel's

decision to not call the mental health witness was a tactical decision and not ineffective assistance of counsel. Thus, trial counsel in this case was likewise not ineffective for making a strategic decision not to call Dr. Mhatre, and the trial court properly denied this claim.

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED ON ARGUMENTS THAT TRIAL COUNSEL SHOULD HAVE CALLED FAMILY MEMBERS TO TESTIFY AT THE MOTION TO SUPPRESS.

The Defendant next argues that the trial court should have found that his trial counsel was ineffective for failing to call his mother, father and sister to testify at the hearing on his motion to suppress his confession. Trial counsel's decision to handle the motion to suppress in this manner was a tactical decision and not the result of ineffective assistance of counsel.

After being apprehended, the Defendant made inculpatory statements to numerous law enforcement officers both in Mississippi and in Florida. On March 8, 1995, trial counsel moved to suppress all of those statements alleging that they

were not freely and voluntarily made. (R. 3531). The trial court heard the motion to suppress on March 13, 1995. Testimony was presented from Russ Williams, Hercules Maxwell, and Neal Nydam (all from the Columbia County Sheriff's Office), FDLE agent Bobby Kinsey, and state attorney's investigator Branson Fisher. The Defendant testified on his own behalf. (R. 2229-2378). After hearing the testimony and the parties' arguments, the Court denied the motion to suppress and found that the Defendant did not ask for an attorney and freely and voluntarily waived his right to remain silent. (R. 2391-92).

On March 23, 1995 the state deposed the Defendant's father and sister. (R. 3714-55). Subsequent to the depositions and during the course of the trial, trial counsel moved to reopen the motion to suppress and entered the depositions into evidence "for the limited purpose of supporting a motion to exclude" the Defendant's statements, not "as evidence in this trial." (R. 546). The State responded by calling Sheriff Lynn Boyte of Brookhaven, Mississippi, to testify that he did not tell the Defendant that the death penalty would not be pursued if he cooperated. (R. 547-54). After hearing the parties, the trial court maintained its prior denial of the motion to suppress. (R. 566).

On direct appeal, the Defendant argued to this Court that

the trial court erred in denying his motion to suppress. (Initial Brief of Appellant Issue #VII). This Court disagreed and affirmed the trial court's denial of the Defendant's motion to suppress. Hamilton v. State, 703 So.2d 1038, 1044 (Fla. 1997). As an initial matter, the State would argue that the resolution of this issue on direct appeal functions as a procedural barr to the present claim. The Defendant had the opportunity to fully raise the suppression on direct appeal and, thus, the substance of this claim is now procedurally barred. See Lopez v. Singletary, 634 So.2d 1054, 1056 (Fla. 1993).

However, in addition to this issue being procedurally barred, the Defendant has also failed to present evidence which demonstrates that his trial counsel was ineffective. At the evidentiary hearing, trial counsel testified that he did not want to put the family members on as live witnesses because they would be subject to cross-examination. (EH. 172). Trial counsel was afraid that such cross-examination could lead to contradictions between each other and even their own prior testimony. (EH. 172). Furthermore, trial counsel noted that everything positive the witnesses had to say was already within their depositions.[4] (EH. 172).

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[4]/ The sister admitted that she shared all the information she had with trial counsel and testified fully to it in her deposition. (EH. 36-38).

These concerns were borne out in the evidentiary hearing. For example, at the evidentiary hearing the sister testified that the authorities told them the Defendant would not get the death penalty if he cooperated. This testimony was consistent with her deposition. (E.g., EH. 28; R. 3745). However, she also confused Detective Russ Williams with Sheriff Boyte (compare EH. 28 with R. 3745). Furthermore, her testimony was inconsistent with the father, who stated that the authorities only said that it might go easier on the Defendant if he cooperated. (EH. 48-50). Thus, trial counsel believed that the depositions would allow him to reap the benefits of the family's statements while avoiding certain pitfalls.

Additionally, trial counsel encountered several other problems as to each of the three family members. As to the sister, trial counsel testified that he was concerned with her because the Defendant had made independent confessions to her. (EH. 172). Trial counsel knew that the prosecution did not have the sister under subpoena and was unlikely to delay the trial to attempt to force her to come to Florida from North Carolina. (EH. 172). However, if trial counsel had called the sister at the second motion to suppress, which occurred after the trial had begun, the sister would have already been in Florida and the State could have easily secured her as a witness. (EH. 172).

Trial counsel also indicated that he was concerned about her lack of cooperation. Both trial counsel and the sister confirmed that she had told trial counsel that she did not want to testify because she was pregnant. (EH. 41, 206). The sister had two prior miscarriages and she felt that testifying might cause her to have another. (EH. 42).

As to the father, he was brought to Florida to testify. However, he initially tried to refuse by saying that his wife would not come. (EH. 206). He eventually did show up, but he was so angry trial counsel decided not to use him. (EH. 206).

As to the mother, trial counsel was concerned about her generally because she had made statements which were not favorable to the Defendant, and she had mental health problems. (EH. 205, 206). But more importantly, prior the trial date, the mother's psychiatrist sent a letter and the mother began calling trial counsel saying that her condition would not allow her to testify and that her psychiatrist would have her committed if she tried to go to Florida. (EH. 107, 206).

Based on these factors, trial counsel made the tactical decision to present depositions in lieu of live testimony. Trial counsel also stated that he discussed this strategy regarding the suppression issue with the Defendant. (EH 195-98). Additionally, trial counsel had to consider the fact that the

Defendant had told him that the police only promised to let the State Attorney know if he cooperated, and that he willingly agreed to show them where the body was and he did not feel threatened. (EH. 196). The Defendant did not mention any other promises, and stated that he decided to confess because he thought being caught in the victim's car (with the evidence found in the car) was already enough to convict him. (EH. 197).

Additionally, it was trial counsel's belief that the Defendant understood his rights both because of his intelligence and because he had been advised of his rights many times.[5] (EH 198-99). Trial counsel also testified that he supplied Dr. Mahtre with the Defendant's Mississippi hospital records. (EH. 167). In Dr. Mahtre's opinion the effects of the drugs administered to the Defendant at the hospital would have worn off by the time the Defendant made his Mississippi statements. (EH. 153). This was confirmed by the Defendant's testimony at the original suppression hearing, where the Defendant admitted that he decided it was in his best interest to make the Mississippi statements and that he later made the same statements when not medicated. (R. 2357, 2373).

Based on all these factors, trial counsel's decision to not

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[5] At the suppression hearing Hamilton testified that he was an eight-time convicted felon. (R. 2354).

call the father, mother and sister to testify at the second suppression hearing was reasonable and the result of a strategic decision. Thus, under the Strickland standard, trial counsel was not ineffective and the trial court properly denied relief as to this ground.

III. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S CLAIM REGARDING VENUE.

The Defendant next claims that the trial court erred in summarily denying his venue claim. In that claim, the Defendant argued that because the charging information listed venue in two different counties as "and/or", then he had the right to elect which county he wanted to be tried in and even to sever counts or sever himself from his co-defendant through his election of venue.

This argument was denied by the trial court without an evidentiary hearing. The trial court found that the issue was procedurally barred because it was the Defendant who had sought to have his trial moved out of the Third Circuit because of concerns over pre-trial publicity. (PCR I 178). This election of a venue change effectively waived the Defendant's post-conviction argument and now bars his claim.

On appeal, the Defendant contends that the trial court misunderstood the basis of his argument. The Defendant contends

that it is his constitutional right to be tried in the county where the crime took place. However, he claims that when the precise county is not known and the State charges alternative counties using the "and/or" conjunction, he should be allowed to elect the county for trial. This is not the problem, however, because the Defendant did essentially elect the county of trial by moving for a change of venue. The problem, as the Defendant sees it, is that the election of venue should have allowed him to sever his charges from his co-defendant's and even to have severed the various counts from each other by electing different counties for each. The Defendant contends that trial counsel was ineffective for not pursuing this option or advising the Defendant about this option.

The State would contend that the trial court correctly determined that the issue of venue has been waived when the Defendant successfully moved to change venue, and the issue of venue is now procedurally barred. Furthermore, the Defendant's arguments regarding a venue-based right to severance are without merit and, thus, do not prove that trial counsel was ineffective.

The trial court correctly determined that the Defendant waived the issue ov venue . Prior to trial, the Defendant made a motion to have the venue of the trial moved from Hamilton

county because of pre-trial publicity. (R. 2458). The trial court originally denied the motion and attempted to select a jury in Hamilton county. However, the attempt was unsuccessful and the State reluctantly agreed that the Defendant's motion should be granted. (R. 2651-2652). The parties and the trial court then began to discuss possible venues where the trial could be moved. (R. 2657). It was eventually determined that Clay county could accommodate the trial while avoiding pre-trial publicity problems. (R. 2657-2669). It should be noted that at no time was there any mention by the Defendant of moving the trial to Columbia county, the alternative venue charged in the information. However, in discussing moving the trial to Clay County, the parties noted that it met the needs of "Hamilton and Columbia Counties". (R. 2657). Thus, it is clear that the parties were continuously aware of the alternatively charged venue, but were actively seeking a venue where there was no taint from pre-trial publicity. Moreover, the Defendant attached numerous newspaper stories to his motion to change venue. (R. 3356-3398). However, out of the 22 articles which were attached, 13 were from the Lake City Reporter, a newspaper based in Columbia County. (R. 3359-3398).

By actively seeking an alternative venue, the Defendant waived any issues as to venue in his case. Florida courts have

repeatedly acknowledged that venue is an issue which can be waived. Lane v. State, 388 So.2d 1022 (Fla. 1980); Tucker v. State, 417 So.2d 1006 (Fla. 3d DCA 1982), result approved, 459 So.2d 306 (Fla. 1982). Furthermore, courts have held that failure to challenge venue defects in the charging document are even waived if not raised. Dean v. State, 414 So.2d 1096, 1099 (Fla. 2nd DCA 1982); Murphy v. State, 407 So.2d 296 (Fla. 1st DCA 1981).

The facts of this case go beyond mere failure to address venue, however. The Defendant in this case affirmatively addressed the issue. The Defendant did not want to be tried in the area where there was extensive pre-trial publicity, so he sought a change to a venue outside of that area. By affirmatively seeking and obtaining an alternate venue, the Defendant not only failed to object to the issue of venue, he actually affirmatively ratified the chosen venue in this case. See Bundy v. State, 455 So.2d 330, 339 (Fla. 1984)("By asking for a change of venue, [the defendant] waived his right to be tried in Leon County [where the crime was committed]"). Accordingly, the Defendant waived any challenge to this issue. Moreover, as the trial court pointed out in its order denying this issue, it is one which could have been raised on direct appeal. Venue is an issue which may be raised on direct

appeal. The Defendant failed to raise this issue in his direct appeal and, as a result, it is now waived. Owen v. State, 773 So.2d 510, 514 (FN. 11) (Fla. 2000). These waivers constitute a procedural bar to the Defendant's claim and, thus, the trial court properly denied the claim.

However, additional justification exists for the denial of the Defendant's claim. The Defendant argues that his trial counsel was ineffective for not seeking to use the alternative venues set forth in the indictment as a means to sever the Defendant's case from the co-defendant, or to sever the additional counts from the murder charge.

Even without an evidentiary hearing this argument is refuted. The existing record from the trial transcript includes an initial hearing on the Defendant's motion to change venue and then a subsequent hearing when the State agreed to the motion. These hearings demonstrate that the decision to seek a trial in a venue outside of Hamilton or Columbia counties was a valid tactical decision.

The evidence in the trial record shows that when trial counsel moved to have venue changed from Hamilton county, he did not seek to have it moved to the alternatively charged Columbia county. Further, the publicity he based his motion on was primarily from Columbia county (the victim's home county), and

Columbia county was never suggested as a possible alternative when the parties discussed which venue the trial would be moved to. Thus, the record in this case conclusively shows that trial counsel made a tactical decision in seeking to have venue moved out of the area, altogether instead of to Columbia county.

Furthermore, under these circumstances it was reasonable for trial counsel to seek to move the venue away from the contaminating pre-trial publicity. Thus, his actions were within the discretion of competent counsel under Strickland. Finally, it was unnecessary for the trial court to conduct an evidentiary hearing for there to be adequate support showing that trial counsel engaged in a strategic decision as to venue. As with this Court's decision in State v. Williams, 797 So.2d 1235, 1240 (Fla. 2001), "counsel's strategy in this case 'amounted to a tactical argument well within the discretion of counsel, so obvious from the record that no evidentiary hearing was necessary.'" Id, quoting, McNeal v. Wainwright, 722 So.2d 674, 676 (11th Cir. 1984).

However, the Defendant also claims that trial counsel was not competent because he failed to apprize the Defendant of the possibility of using a change of venue to sever his charges from the co-defendant's or to sever the murder charge from the others. The Defendant argues that by doing this, he could have

avoided prejudicial evidence which came as a result of his being tried with the co-defendant and for the additional crimes of armed robbery, armed sexual battery and armed kidnaping. This claim is without merit and does not demonstrate any ineffective assistance of counsel.

Counsel cannot be ineffective for failing to raise an issue which is without merit. Lawrence v. State, 2002 WL 31317967 *11 (Fla. 2002), citing, Kokal v. Dugger, 718 So.2d 138, 142 (Fla. 1998). In the present case, post-conviction counsel claims that trial counsel should have used venue to effect a severance in this case or at least informed the Defendant of his right to do so. However, post-conviction's analysis of this issue is incorrect, and the Defendant could not have used venue in this way.

The Defendant bases his argument on the case of Leon v. State, 695 So.2d 1265 (Fla. 4th DCA 1997). In Leon, the Fourth District addressed a situation where the exact venue was not known and the charging documents set forth the two possible venues as "and/or". Such cases fall under Fla. Stat. 910.03 which allows for the State to charge multiple venues when the exact venue is not known. Section 910.03, which is derived from the rights set forth in Article I, Section 16 of the Florida Constitution, allows the accused to elect the county of trial

when the precise county is not certain.

However, section 910.03 is not applicable in this case. Instead, it is section 910.05 which applies in the present case. Section 910.05 deals with crimes where acts constituting the crime are committed in more than one county. In such cases, the State may elect the county in which venue will lie. See Martin v. State, 488 So.2d 653 (Fla. 1st DCA 1986)("If a single crime occurs in more than one known county, section 910.05 controls, and the case can be tried in any of the counties named at the state's option."), citing, Copeland v. State, 457 So.2d 1012, cert. denied, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 324 (1985), and, Crittendon v. State, 338 So.2d 1088 (Fla. 1st DCA 1976); see also Barclay v. State, 343 So.2d 1266 (Fla. 1977).

The Defendant ignores these cases and section 910.05, instead he mistakenly focuses on the analysis of the "and/or" language in Leon. The Defendant contends that Leon stands for the principle that if the State charges venue using the conjunction "and", then the State may choose the county for trial. He then claims that if the State uses "or" or "and/or", then the Defendant may choose venue. This is an incorrect analysis of Leon.

In Leon, the Fourth District was focusing on the "and/or" language because it was concerned whether that particular

conjunctive phrase could be used to charge venue under Fla. Stat. 910.03. The Fourth District found that this was a permissible, although unrecommended, phrasing. However, it was the application of section 910.03 which gave the Defendant the right to elect venue in that case, and not the turn of phrase.

Additionally, the Defendant's argument ignores that there are additional rules which govern the joinder or severance of both counts and defendants. Fla.R.Crim.P. 3.150, 3.151 & 3.152 (1994). Even assuming *arguendo* that there is any merit to the Defendant's arguments, they would still have to be balanced against the principles governing joinder and severance. Thus, assuming that a defendant has the option to elect venue for some reason, he would not automatically be able to break up different counts charged against him into different venues, nor would this automatically allow a defendant to sever himself from a co-defendant, particularly when the co-defendant could be tried in that same county. Given this assessment, the Defendant's claim that he could have used this venue argument to affect the outcome of his trial is pure conjecture. The Defendant is required to show that any alleged deficiency on the part of his trial counsel prejudiced him. Strickland v. Washingtno, 466 U.S. at 694. The Defendant has not done so in this argument. According, the Defendant has failed to establish that his trial

counsel was ineffective.

Finally, it should be noted that the Defendant has failed to provide any caselaw which supports his contention that choice of venue can be used to sever counts or defendants. The Leon case cited by the Defendant does not apply choice of venue to severance issues, and the Defendant has cited no other cases which discuss any possible interrelation between the two doctrines; nor can the State find any cases on this issue. Thus, the State would contend that the Defendant is presenting a novel legal argument. However, trial counsel cannot be ineffective for not raising a novel argument. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985)("The failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel.") .

Thus, the Defendant has failed to established that this claim is not procedurally barred, that trial counsel did not choose to move venue beyond Hamilton and Columbia counties as a tactical decision, that there is any merit to his argument that venue can be used to sever parts of his case, or that trial counsel can be ineffective for not raising this novel issue. According, the trial court properly denied this issue.

IV. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM BASED ON TRIAL COUNSEL'S HANDLING OF AN ISSUE INVOLVING WHAT JURORS COULD HEAR WHAT OUTSIDE THE COURTROOM.

In his fourth issue on appeal, the Defendant claims that trial counsel was ineffective because, while his jury was out of the courtroom, it might have allegedly overheard testimony and discussions from which it was meant to be excluded. The issue arose as follows.

At the beginning of the proceedings on May 22, 1995 a bailiff informed the trial court that when the trial court used the microphone, the sound carried into the jury room where the juries were sometimes held. (R. 771). There were no speakers in the jury room, but apparently the speakers in the courtroom caused the sound to carry into the jury room. The sound did not carry when the judge did not use the microphone. (R. 772).

At the evidentiary hearing the Defendant called two of the bailiffs from his trial, Tom Slattery and Donald Lowe, neither of whom remembered the discussion regarding the microphones in the courtroom. (EH. 18-22; 157-62). However, Bailiff Slattery recalled that there were two locations where juries could be housed. (EH. 22). One was the jury room adjacent to the courtroom. (EH. 22). The other was down the hall and away from the courtroom. (EH. 22). Bailiff Lowe recalled being in the

jury room adjacent to the courtroom but testified that he could not remember be able to hear anything from the courtroom. (EH. 161).

Trial counsel also testified regarding this issue. He stated that he could not remember any great concern about the microphones. (EH. 174-76). On cross-examination he testified that he felt that all that was needed to be done about the microphones had been done (EH. 199-201), i.e., a potential problem was brought to the Court's attention and corrected.

The Defendant now argues that trial counsel was ineffective because he should have done more to ensure that his jury could not have heard any testimony which occurred while it was out of the courtroom. The Defendant does not claim any error occurred after the issue was brought to the trial court's attention. Instead, he claims that prejudicial testimony was presented prior to the incident and that trial counsel did not take steps to determine whether the Defendant's jury had heard that testimony.

Trial counsel, however, must be presumed to have acted in a competent manner, and the Defendant presented nothing at the evidentiary hearing to support his conclusory allegations. Gudinas v. State, 816 So.2d 1095, 1101-02 (Fla. 2002); Maxwell v. Wainwright, 490 So.2d 927, 932 (Fla. 1986) ("It is almost

always possible to imagine a more thorough job being done than was actually done.”). Furthermore, the evidence that was presented indicates that trial counsel engaged in the conduct of reasonably competent counsel.

First, trial counsel indicated that the issue was addressed, corrected, and he could recall nothing about the incident that indicated further need for correction. Second, the one bailiff who could recall being in the jury room, did not recall being able to hear any of the discussions going on in the courtroom. Thus, the record fails to demonstrate any evidence which would indicate that trial counsel’s conduct was deficient.

The Defendant complains that he wanted to have members of the jury brought to the evidentiary hearing to testify as to this issue. However, this request was properly denied because the jurors’ testimony could not have been probative as to ineffective assistance of counsel. The issue in this case is what reasonable counsel would have done under the circumstances. Thus, the focus must be on what information was available to trial counsel at that time. The jurors’ testimony was not known to trial counsel when this issue arose and would not be probative of whether his conduct was reasonable at that time.

More importantly, however, is the fact that the Defendant has failed to demonstrate prejudice as to this issue. Of the

evidence which was presented outside of the presence of the Defendant's jury prior to this issue being raised, the Defendant now complains about the testimony of Sheriff Boyte during a motion to suppress (R. 546-575)[6] and before the co-defendant's jury. (R. 730-741). Specifically, the Defendant claims that the Defendant's jury may have heard testimony about the Defendant's confession, discussions regarding plea negotiations, and testimony about the Defendant's plans to escape from the Mississippi jail.

As to the issue of the Defendant's jury possibly overhearing testimony from the motion to suppress regarding his confession, the Defendant cannot demonstrate prejudice. This is because the confession was admitted in the State's case-in-chief and fully presented to the jury. (R. 632-650). Thus, the jury could not have been tainted even if they did hear about the confession while out of the courtroom because they heard the full substance of the confession during the trial.

The Defendant argues in his brief that the jury was able to hear "prejudicial testimony, at least some of which was not subsequently presented to the jury." (Amended Brief of Appellant

[6] It should be noted that the Defendant claims in his brief that both Sheriff Boyte and Deputy Williams testified at the motion hearing. However this is incorrect, only Sheriff Boyte testified. (R. 545-575).

at 40). However, the Defendant does not specify what testimony was not presented to the jury. Presumably the Defendant is talking about the allegations that his confession was elicited based on alleged promises not to seek the death penalty. The State would contend that such evidence is not prejudicial and could actually have benefitted the Defendant, if the jury had believed the confession was coerced. Moreover, given the vast amount of evidence arrayed against the Defendant and the fact that his theory of defense is that he refused to participate in the murders, the State would argue that even assuming *arguendo* that the jury heard the testimony it would not have tainted their veridict.

Next, the Defendant claims that the jury could have heard references to plea negotiations, citing to page 565 of the trial transcript. The Defendant is misrepresenting this claim, however. The references he is talking about are actually arguments of trial counsel in the motion to suppress. Trial counsel was claiming that the Defendant's confessions were actually part of a plea negotiation and that they should be suppressed under Rule 3.172(h). The Defendant claimed that a plea negotiation was taking place because the police were supposedly offering to not seek the death penalty if he confessed and because the Defendant alleged that a Mississippi

prosecutor was present. However, even assuming that all of the Defendant's allegations were true (and the record does not support this), the references could not be construed as a plea negotiation in this sense that the Defendant is implying. At best, these allegations are only part of the argument discussed above regarding supposed promises to get the Defendant's confession, and for the reasons stated above there is no prejudice.

Finally, the Defendant claims that the jury may have overheard discussions about a letter he wrote to the co-defendant discussing plans to escape from the Mississippi jail. This letter and the planned escape were discussed in the trial transcript at pages 573-574 and 730-741, as cited by the Defendant. However, once again the Defendant cannot show prejudice because the letter was introduced into evidence by the State and read to the jury. (R. 683, 691, 693-699). Thus, whether or not the jury could possibly have heard about the letter while outside of the courtroom, it would not have been prejudicial because they were presented with the letter during the trial.

The Defendant argues, however, that the Defendant's jury may have been exposed to testimony regarding the planned escape which did not come in through the letter. This testimony

includes discussions that the Defendant cut out a section of the window grate on his cell with a hack saw, and that the trial court called the letter admissible as consciousness of guilt. However, neither the testimony about the hacksaw and window, nor the trial court's comment demonstrate sufficient prejudice to support a finding of ineffective assistance of counsel. The testimony about the hacksaw and cut window grating pales in comparison to the letter which sets forth in detail (including a map) a plan to kill the jailor and trustees in order to escape. And the trial court's comment about consciousness of guilt was minimal in a case where the Defendant confessed to Deputy Williams and Agent Kinsey of the FDLE, showing extensive consciousness of guilt.

Additionally, it should be noted that the Defendant has also failed to show prejudice because he has not established that the Defendant's jury was in the adjacent courtroom when these matters were heard. As Bailiff Slattery testified there were two locations where the juries were held and only one of them was near the courtroom. Furthermore, there was no evidence which established the extent to which sound carried into the jury room and whether it was loud or clear enough to be comprehensible, especially in light of Bailiff Lowe's testimony that he did not hear courtroom conversations when he was in the

jury room with the jurors.[7] Accordingly, the trial court correctly denied this claim.

[7] Particularly, when it is unlikely that the jurors were being quiet or attempting to hear what was occurring in the courtroom, and where it is likely they were talking amongst themselves.

V. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S INEFFECTIVE ASSISTANCE CLAIM BASED ON TRIAL COUNSEL'S HANDLING OF ALLEGATIONS THAT JURORS WERE DISCUSSING THE MEDICAL EXAMINER PRIOR TO DELIBERATION.

In his fifth issue, the Defendant also argues that his trial counsel did not do enough to insure that his jurors did not engage in misconduct when the Defendant's cousin overheard them discussing the medical examiner. The Defendant has failed to demonstrate substandard representation and prejudice as to this claim.

On May 23, 1995, trial counsel announced to the Court that the Defendant's cousin, Donnie Simmons, told him that he overheard the Defendant's jurors talking about the medical examiner. (R. 1206). Before recessing for the day the trial court heard Mr. Simmons, who described overhearing three jurors talking about the medical examiner's qualifications. (R. 1219-20). Mr. Simmons testified that he heard them say nothing else about the case except the comments about the medical examiner, and he could not recall their exact words. (R. 1221-24). The judge then stated that he would instruct the jurors specifically to have no discussions. (R. 1224).

At the evidentiary hearing, however, Mr. Simmons' testimony was different. There, Mr. Simmons testified that one of the jurors said the medical examiner did not know what said she was

talking about. (EH. 188-19). On cross-examination by the State, Mr Simmons admitted that his current testimony differed from what he said at trial. (EH. 121-25). Additionally, trial counsel testified that, although he did not remember everything he thought and did at trial, he believed he took reasonable steps regarding this claim. (EH. 207). In denying this claim, the trial court found that trial counsel had brought the matter to the trial court's attention and had not shown that trial counsel's representation was anything but reasonably competent.

The trial court was correct in this assessment. The Defendant presented nothing to overcome the presumption that trial counsel acted in a reasonable manner. Trial counsel brought the situation to the trial court's attention, and the trial court addressed it. The contemporaneous evidence at that time was insufficient to raise concerns that the jurors' conversation undermined the trial, and the trial court took the prudent step of instructing the jury against any further pre-deliberation discussions of the evidence. Furthermore, the testimony of the cousin at the evidentiary hearing was insufficient to demonstrate that trial counsel was ineffective during the trial. First, the cousin's testimony was not credible because it contradicted his earlier more reliable version of the incident and because, as a relative of the

Defendant, he has a motive to fabricate testimony. Additionally, the focus in this issue should be what a reasonable attorney would have done with the information available to him at that time. The information available to trial counsel during the trial was insufficient to raise further concerns or warrant additional action by the trial court.

This Court has previously found that pre-deliberation conversations between jurors may not be prejudicial when, as in this case, the comments are only reactions to testimony and do not indicate that the jurors formed a premature opinion about the case. Johnson v. State, 696 So.2d 317, 324 (Fla. 1997). In Johnson, two jurors were discussing a doctor's testimony about wounds suffered by the victim. Id. They discussed the traumatic nature of the wounds, and the good explanation given by the doctors. Id. This Court held that the discussion could not have conceivably influenced the result, and that the discussion did not prejudice the Defendant. Id.

Similarly, based on the testimony of the cousin at the time of trial, the conversation of the jurors in this case did not rise to a level which prejudiced the Defendant and trial counsel was not ineffective for failing to pursue the matter further after presenting the cousin's testimony to the trial court.

Accordingly, the Defendant has failed to demonstrate how

trial counsel was ineffective in the present case. Thus, the lower court did not err in denying this claim.

VI. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING TRIAL COUNSEL'S DECISION TO ALLOW DEFENDANT'S JURY TO HEAR THE CO-DEFENDANT'S CROSS-EXAMINATION OF TROOPER LEGGETT.

In his sixth claim, the Defendant argues that his trial counsel was ineffective when he allowed the Defendant's jury to hear the co-defendant's cross-examination of Trooper Leggett after the trial court had offered to excuse the Defendant's jury. However, the Defendant has failed to demonstrate ineffective assistance, because the decision to allow the Defendant's jury to remain was a reasonable tactical decision by trial counsel.

At trial, the co-defendant's counsel announced that his cross-examination of Trooper Leggett would probably produce testimony against the Defendant, who might not want his jury present. (R. 444). Trial counsel asked for a short recess to confer with the Defendant about whether the Defendant wanted to have his jury excused or present for the co-defendant's cross-examination. (R. 445-446). After the recess, trial counsel announced that the Defendant and his jury would remain in the courtroom. (R. 447-448). The trial court then inquired of the Defendant regarding this decision and the Defendant stated that the issue had been explained to him and he agreed. (R. 447-48).

At the evidentiary hearing, trial counsel explained that

having the Defendant's jury hear the cross-examination was a strategic decision. (EH. 201-04). Trial counsel had deposed Trooper Leggett and had a good idea of what he would say. (EH. 178, 203-04). As expected, Trooper Leggett testified that the Defendant told him that if he had not shot when the trooper was attempting to stop them, the co-defendant would have killed the trooper when he approached their vehicle. (R. 451). The Defendant claimed that he was trying to save the trooper's life by shooting at him. (R. 453).

Trial counsel testified that he could not have presented this self-serving statement to the Defendant's jury in any way other than through the co-defendant's cross-examination of Trooper Leggett. (EH. 204). Trial counsel was aware that the co-defendant's cross-examination of the trooper would involve prejudicial testimony. (EH. 177). However, after discussing the matter with the Defendant and co-counsel, trial counsel made the strategic decision that the need for the Defendant's jury to hear the trooper's testimony, outweighed potential problems. (EH. 202).

"A tactical decision amounts to ineffective assistance only if it was so patently unreasonable that no competent attorney would have chosen it." Alexander v. Dugger, 841 F.2d 371, 375 (11th Cir. 1988). Moreover, "[s]trategic decisions do not

constitute ineffective assistance if alternative courses of action have been considered and rejected." State v. Bolender, 503 So.2d 1247, 1250 (Fla. 1987); Gudinas, 816 So.2d at 1101-02; Sweet v. State, 810 So.2d 854, 859 (Fla. 2002); Rutherford v. State, 727 So.2d 216, 223 (Fla. 1998). Trial counsel considered the effect of Trooper Leggett's testimony and decided that the Defendant's statement to Trooper Leggett might ameliorate some of the other evidence already presented. (EH. 202-04). This was a reasonable tactical decision and, in view of the overwhelming evidence against the Defendant, did not contribute to his being convicted of first-degree murder. It should also be noted that trial counsel in this case had 27 years of experience, had tried his first capital case in 1973 and has tried a total of 15 death cases over the years. This Court has held that such factors are important considerations when determining reasonableness in this context. In Shere v. State, 742 So.2d 215, 220 (Fla. 1999), the issue concerned trial counsel's decision to call a detective as a defense witness because it allowed the State to present statements from the co-defendant which conflicted with those of the defendant. Id. at 219. This Court found that trial counsel made a tactical decision to accept the unfavorable testimony in order to present testimony which he considered important to the defense. Id. at 220. In

making this determination, this Court took into account the experience of the attorney and the careful consideration which was put into the decision. Id; see also Johnson v. State, 769 So.2d 990, 1000-1001 (Fla. 2000)(Defense counsel did not provide ineffective assistance by making tactical decision to use jailhouse informant's testimony, even though some of informant's testimony would be damaging).

In the present case, trial counsel made a similar difficult decision to accept some potentially harmful testimony from the cross-examination of Trooper Leggett in order to present the Defendant's self-serving statement to the jury. Trial counsel was an extremely experienced and competent attorney who carefully considered this issue and discussed it with the Defendant. Furthermore, as in Shere, the damaging testimony was of minimal harm because the substance of the prejudice was already before the jury. Shere v. State, 742 So.2d at 220. In his Initial Brief, the Defendant points to the fact that Trooper Leggett was cross-examined about the chase and the shoot-out. However, this evidence was already before the jury from the State's direct examination of the Trooper. The Defendant could not have excluded his jury from this direct examination, only from the co-defendant's cross-examination. Thus, trial counsel's decision should also be weighed in light of the fact

that the substance of the prejudicial testimony had already been presented to the Defendant's jury.

The Defendant also claims that the famous case of Bruton v. United State, 391 U.S. 123 (1968) demonstrates trial counsel's ineffectiveness because it shows the importance of keeping prejudicial statements by a co-defendant from the Defendant's jury. However, this argument misses the point. Bruton may have allowed trial counsel to exclude the Defendant's jury from the co-defendant's cross-examination. However, that issue was never in doubt. Trial counsel clearly had the option to exclude the Defendant's jury from this testimony. The issue was that trial counsel made a tactical decision to not have the Defendant's jury removed during the co-defendant's cross-examination of Trooper Leggett. Thus, the Defendant's reference to Bruton is misplaced.

Additionally, the Defendant is mistaken when he claims that the evidence which trial counsel sought to have put before the Defendant's jury only applies to the penalty phase. The testimony which trial counsel sought was that the Defendant told the trooper that he only shot at him to warn him off and save his life. This evidence was important because the jury had already heard that the Defendant had been shooting at the trooper during the chase. (R. 404-409). The Defendant's defense

in the case was that he did not know about the co-defendant's intent to kill the victim, and that he made statements to the co-defendant saying that he did not want to kill her. This theory, however, was substantially undermined by the fact that he was shooting at the trooper, presumably to kill him. Thus, it was extremely important for trial counsel to present some basis to the jury explaining how the Defendant was not trying to kill the trooper. Accordingly, the Defendant's argument that this evidence only applies to the penalty phase is incorrect.

Thus, the State would contend that trial counsel's decision was considered, reasonable and did not amount to ineffective assistance of counsel. Therefore, the lower court properly denied this issue.

VII. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING AN INDEPENDENT ACT INSTRUCTION.

The Defendant also argues that the trial court erred in denying his post conviction claim regarding a possible independent act instruction. The trial court denied this issue without holding an evidentiary hearing.

On appeal, the Defendant argues that the prosecutor essentially offered to let the Defendant have an independent act

instruction, but trial counsel declined. This characterization of the facts is not supported by the record.

During the trial, trial counsel made a motion requesting that the instruction of withdrawal be given. When the motion was heard, the prosecutor argued that withdrawal should not be a recognized defense and, even if it is, the Defendant would need to show more evidence of withdrawal, i.e. more than saying I do not want to kill the victim, to receive an instruction on it. (R. 1906-1913). In making this second part of his argument, the prosecutor referenced a case involving an independent act instruction. (R. 1912). The prosecutor noted that the withdrawal and independent act instructions are very similar, as a means of analogizing that case to the Defendant's trial. (R. 1912). The prosecutor then proceeded to argue that for the defendant in that case to be entitled to an independent act instruction, he had to show a much greater degree of renouncing and extricating himself from the crime which subsequently occurred. (R. 1912). In making this argument, the prosecutor was not arguing that the Defendant would be entitled to an independent act instruction, nor he was offering to allow the Defendant to have the that instruction read to the jury. Instead, the prosecutor was arguing, by analogy to the independent act instruction, that the Defendant had not made a

sufficient showing to obtain a withdrawal instruction.

The Defendant is apparently basing his current argument on trial counsel's characterization of the prosecutor's argument. In response to the prosecutor's argument against the withdrawal instruction, trial counsel said,

> Judge, that's an interesting position for the State to have. First the State urges that the Supreme Court was wrong to recognize that there is a withdrawal defense. He had argued that despite the Supreme Court opinion, there is no such defense as withdrawal. And he's argued that if there is a defense, defense's (sic) independent act.
>
> Quite candidly, I considered requesting an instruction on independent acts, but reached a conclusion that under the circumstances as disclosed by the evidence brought forward in this case, the defense of independent acts simply do (sic) not apply.

(R. 1913). In appears that post-conviction counsel has interpreted this comment as signifying that the prosecutor offered to have the jury given the independent act instruction. This interpretation is incorrect.

First, this comment was made by trial counsel and not by the prosecutor, thus, it could not constitute an offer. Furthermore, a reading of the prosecution's argument shows that the prosecution never made such an offer and was making arguments, by way of analogizing to the withdrawal instruction, which demonstrated that the independent act instruction was not proper in the Defendant's case. Thus, at the very least, the record affirmatively demonstrates that the prosecutor never

offered the have the independent act instruction read to the jury, and actually demonstrates that the prosecutor would have argued against that instruction as well.

Accordingly, the State would contend that trial counsel was not ineffective in this case for failing to accept an alleged offer to give the independent act instruction because the prosecutor never made such an offer. Furthermore, it seems clear from the prosecutor's argument that he would have also challenged independent act instruction if it had been requested.

Additionally, it should be noted that the independent act instruction was even less applicable to the present case, and the Defendant would have been less likely to have received this instruction. The independent act doctrine requires that the Defendant not have participated in the crime at issue and that it "fall outside of, and [be] foreign to, the common design of the original collaboration." Ray v. State, 755 So.2d 604, 609 (Fla. 2000), quoting, Dell v. State, 661 So.2d 1305, 1306 (Fla. 3d DCA 1995). The withdrawal defense, on the other hand, required that the Defendant show "that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoing the criminal plan." Hamilton v. State, 703 So.2d 1038, 1042 (Fla. 1997).

In the present case, the only evidence supporting the instructions are the Defendant's self-serving statements to police saying that he wanted to let the victim go. Id. at 1043. This Court found that evidence insufficient to require that the withdrawal instruction be given. This evidence would be even less likely to establish that the Defendant did not participate in the crime and that it was outside of and foreign to the common design of their original collaboration. Moreover, the evidence in this case demonstrated that the Defendant, at best, did nothing more than say he did not want to kill the victim, while he helped hide the body, shot at the police when they tried to stop the defendants, and was part of a common scheme to escape from prison, steal a vehicle, guns and not to be captured.

Trial counsel recognized that this defense was less likely to be successful, thus he focused on the withdrawal defense. As set forth above, trial counsel stated, "[q]uite candidly, I considered requesting an instruction on independent acts, but reached a conclusion that under the circumstances as disclosed by the evidence brought forward in this case, the defense of independent acts simply do (sic) not apply." (R. 1913). Trial counsel was correct in this assessment. Florida courts have repeatedly held that similar facts do not warrant this

instruction. See Lovette v. State, 636 So.2d 1304 (Fla. 1994)(rejecting independent act instruction where murders committed to lessen possibility of detection and apprehension of robbers); Parkers v. State, 458 So.2d 750 (Fla. 1984)(holding that defendant who participated in kidnaping as part of effort to terrorize victim into paying his portion of drug debt to defendant could not claim that cofelon's murder of victim was an independent act); Ray v. State, 755 So.2d at 609 (rejecting independent act instruction where murder facilitated escape from robbery scene); Dell v. State, 661 So.2d 1305, 1306 (Fla. 3d DCA 1995)(holding independent act instruction inapplicable where evidence demonstrated that murders of store clerks were meant to eliminate the only eyewitnesses to robbery).

Thus, it seems extremely unlikely that the Defendant would have been able to successfully argue for the independent act instruction when the trial court had already denied the more applicable withdrawal instruction.

As this Court has said many times, trial counsel cannot be ineffective for failing to raise an issue which is without merit. Lawrence v. State, 2002 WL 31317967 *11 (Fla. 2002), citing, Kokal v. Dugger, 718 So.2d 138, 142 (Fla. 1998). In the present case, in light of the rulings by the trial court and this Court as to the withdrawal instruction, the Defendant could

not have successfully argued for the independent act instruction. Accordingly, trial counsel was not ineffective for failing to raise this issue because it was without merit.

Finally, the Defendant has failed to demonstrate prejudice as required by Strickland. As this Court held in regard to the denial of the withdrawal instruction, the Defendant's defense was inconsistent with instruction. Furthermore, given the strength of the evidence demonstrating the Defendant's involvement in escaping from prison, stealing the first car, stealing guns, abducting the victim and stealing her car, raping her, hiding her body, fleeing to Mississippi, and then shooting it out with police when facing potential arrest, any potential error in this case was harmless and the Defendant has failed to show the requisite prejudice necessary for ineffective assistance of counsel.

VIII. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL BASED ON THE TACTICAL DECISION NOT TO CALL DR. MHATRE AND CERTAIN FAMILY MEMBERS DURING THE PENALTY PHASE.

In his eighth claim the Defendant argues that his trial counsel was ineffective for not calling the psychiatrist, Dr. Mhatre, and the Defendant's sister, mother and father to testify during the penalty phase. The testimony presented at the

evidentiary hearing does not support his claim.

At the hearing, the Defendant presented the testimony of all three family members - his father, mother and sister - who did not testify for him at his penalty phase.[8] As set forth in section (4) of the Statement of Facts from the Evidentiary Hearing, the family members testified that the Defendant grew up in a bad neighborhood. His father worked the night shift and his mother and father argued over discipline. At age 10, the Defendant was shot in the eye with a BB gun and had to undergo several surgeries and take pain medications. Both before and after this incident, the Defendant used drugs and alcohol.

Trial counsel, however, made a tactical decision not to call these family members. This decision was based on a number of factors. First, as to the Defendant's mother, Jewel Neal, there were problems because she had a history of mental health problems (including being institutionalized twice), she was on heavy medication and had made unfavorable comments about the Defendant, i.e. there not being a lot of mitigation about the Defendant. (EH. 104-10, 205). The mother also admitted that the Defendant threatened his brother with a gun and then hit him, breaking his shoulder, and that the Defendant placed a knife to

[8]/ The Defendant's brother and cousin also testified at the hearing. However, both of them were called on behalf of the Defendant during the penalty phase. (R. 2070, 2081).

her stomach, drawing blood. (EH. 111-12). More importantly, however, when it came time to testify, the mother and her psychiatrist began contacting trial counsel telling him that if he tried to bring the mother to testify, the psychiatrist would have her committed. (EH. 107, 205).

The sister raised concerns because the Defendant had made inculpatory statements to her which were not admitted into evidence but would have come out at the penalty phase. (EH. 172). She also testified that she did not want to testify at Hamilton's trial because she was pregnant and feared a miscarriage. (EH. 41-44).

This unwillingness is important because it can strongly impact the effectiveness of a penalty phase witness. This problem also arose with the father who came to the trial and was available for the penalty phase. However, the father had likewise attempted to get out of appearing. He called trial counsel and said that he did not want to come because his wife was unwilling. (EH. 206). The father eventually did show up, but he was so mad that trial counsel decided not to use him as a witness. (EH. 206).

This Court has previously noted that such lack of cooperation can in itself render trial counsel's decision to not call witnesses reasonable. In Gorby v. State, 819 So.2d 664,

674-75 (Fla. 2002), counsel chose not to call the Defendant's father to testify at the penalty phase because his testimony was cumulative and he had "very little, if any, interest in assisting with his son's case." This Court found that counsel's decision not to use the father was a reasonable tactical decision and that counsel was not ineffective. Id. This case presents similar circumstances. Trial counsel was faced with uncooperative or unavailable witnesses whose testimony would had been essentially the same as the cooperative witnesses who actually testified, i.e. the brother, cousin and Mrs. Baker. Thus, based on Gorby alone, trial counsel's decision was reasonable.

Additionally, it should be noted that trial counsel's decision was an informed one. He had talked to all of the family members prior to the trial and knew what their testimony would be. Both the father and sister confirmed these conversations. (EH. 36, 40-41, 56-58). Furthermore, trial counsel was aware that he had the testimony of the Defendant's brother and cousin, as well as Ann Baker, the mother of a former girlfriend, which would establish all of the same facts to which the other witnesses could have testified, but without the potential problems. (EH. 2070, 2081, 2095). Thus, trial counsel made a tactical decision to use witnesses who did not

create a potential problem for his penalty phase case, while still being able to testify to all of the factors which were potential mitigation for the Defendant. Accordingly, this case is similar to others where counsel were found to have made adequate investigations and reasonable choices. See e.g., Sweet v. State, 810 So. 2d 854 (Fla. 2002); Stewart v. State, 801 So.2d 59, 67 (Fla. 2002); Rutherford v. State, 727 So.2d 216, 226 (Fla. 1998).

The Defendant has also failed to show how trial counsel's representation prejudiced him. As discussed above, the Defendant's cousin, his brother Tim, and Ann Baker, the mother of a former girlfriend, testified on his behalf. Based on their testimony, the trial court found that five non-statutory mitigators had been established: (1) Hamilton was raised in a drug-ridden, crime infested neighborhood; (2) Hamilton's mother was mentally ill; (3) Hamilton suffered various childhood traumas, including the loss of an eye in a BB gun accident; (4) Hamilton had been gainfully employed and had good work habits; and (5) Hamilton assisted police in locating the victim's body. (R. 4166-67). These are essentially the same mitigators which the father, mother and sister could have testified to, and their testimony at the evidentiary hearing did not establish any statutory mitigators. Thus, the testimony of the father, mother

and sister would have been merely cumulative to that introduced at sentencing.

It is not error for trial counsel to make a tactical decision to not present such cumulative testimony. In Gundinas v. State, 816 So.2d 1095, 1105-06 (Fla. 2002), this Court found no error when trial counsel declined to present the testimony of the Defendant's aunt when her testimony would have been essentially cumulative. Likewise, in Atwater v. State, 788 So.2d 223, 234 (Fla. 2001), this Court found that it was not error to forego the testimony of Defendant's family members when it was cumulative to the testimony of an expert witness, even though that evidence was only presented as hearsay through the expert. Accordingly, the fact that the father, mother and sister's testimony would have been cumulative to the other witnesses' testimony renders trial court's decision reasonable and negates any potential prejudice.

Finally, given the six strong aggravators established by the state (under sentence of imprisonment; prior violent felony; felony murder; hinder law enforcement; heinous, atrocious, or cruel; and cold, calculated, and premeditated), the overwhelming inculpatory evidence, the jury's recommendation of death, and the paucity of the mitigation, no different result could have been obtained. Porter v. State, 788 So.2d 917 (Fla. 2001);

Cherry v. State, 781 So.2d 1040 (Fla. 2000); Johnson v. State, 769 So.2d 990 (Fla. 2000). This claim, therefore, should be denied.

The Defendant also argues that his trial counsel was ineffective for not calling Dr. Mhatre to testify about his family history and mental health mitigation in the penalty phase. However, trial counsel's decision not to call Dr. Mhatre was a considered and tactical one. The facts and arguments supporting trial counsel's decision are the same as those more fully discussed in Argument #1 above.

IX. THE UNITED STATES SUPREME COURT'S DECISION IN RING V. ARIZONA DOES NOT INVALIDATE THE DEFENDANT'S SENTENCE OF DEATH.

In his final argument, the Defendant contends that his sentence should be vacated based on the United States Supreme Court's ruling in Ring v. Arizona, - U.S.-, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Defendant claims that Florida's capital sentencing scheme violates Ring, that it applies retroactively to his case, and that this Court's recent decision in Bottoson v. Moore, 813 So. 2d 31 (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002) establishes that the Defendant is entitled to relief.

RETROACTIVITY

The Defendant's claim that this issue applies to him retroactively is without merit. As an initial matter, it should be noted that the Defendant's claim under Ring is also procedurally barred. A Ring claim is based on a Sixth Amendment right to a jury trial and, as such, it should be raised on direct appeal, not in post-conviction litigation. McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001)(holding that an Apprendi claim was procedurally barred in a § 2255 petition because the claim was not raised on direct appeal); State ex rel. Nixon v. Sprick, 59 S.W.3d 515, 520 (Mo. 2001)(holding that Apprendi claims are procedurally barred if not asserted on direct appeal).

Furthermore, the Defendant is also incorrectly claiming that Ring should be applied to him retroactively. Ring is based on the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which has been repeatedly held to not be retroactive. Florida's First District Court of Appeal has held that Apprendi is not retroactive in a non-capital case. See Hughes v. State, 826 So.2d 1070 (Fla. 1st DCA 2002)(holding that Apprendi is not retroactive but certifying the issue to the Florida Supreme Court). Numerous federal circuit courts of appeal have held

that Apprendi is not retroactive.[9] Moreover, the United States Supreme Court has refused to apply the right to jury trial cases retroactively in the past. DeStefano v. Woods, 392 U.S. 631, 633, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968)(holding that the right to jury trial in state prosecutions was not retroactive and "should receive only prospective application.").

The United States Supreme Court also recently held that an Apprendi claim is not plain error. United States v. Cotton, 122 S.Ct. 1781 (May 20, 2002)(holding an indictment's failure to include the quantity of drugs was an Apprendi error but did not rise to level of plain error). If an error is not plain error, the United States Supreme Court will not find the error of sufficient magnitude to allow retroactive application of such a claim in collateral litigation. See United States v. Sanders,

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[9] United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001), cert. denied, 122 S.Ct. 573 (2001)(explaining that because Apprendi is not retroactive in its effect, it may not be used as a basis to collaterally challenge a conviction); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002) (holding Apprendi is not retroactive because it is not a substantive change in the law; rather, it "is about nothing but procedure" and it is not fundamental because it is not even applied on direct appeal unless preserved); United States v. Brown, 305 F. 3d 304 (5th Cir. 2002); Goode v. United States, 305 F. 3d 378 (6th Cir. 2002), citing, Neder v. United States, 527 U.S. 1, 15 (1999); United States v. Moss, 252 F.3d 993, 1000-1001 (8th Cir. 2001), cert. denied, 122 S.Ct. 848 (2002); United States v. Sanchez--Cervantes, 282 F.3d 664, 667 (9th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001).

247 F.3d 139, 150-151 (4th Cir. 2001)(because Apprendi claims have been found to be subject to harmless error, a necessary corollary is that Apprendi is not retroactive).[10] Accordingly, because Ring is not retroactive, the Ring claim raised by the Defendant in the present case is barred.

DEFENDANT'S ARGUMENTS

Besides being barred, the Defendant's Ring-based claims are without merit. The Defendant claims that Ring invalidates Florida's sentencing scheme. He bases his argument on this Court's analysis of the Ring decision in Bottoson. The Defendant acknowledges that Bottoson found, based on variety of rationales, that Ring did not invalidate Bottoson's death penalty sentence. However, the Defendant claims that several factors addressed in Bottoson amount to an invalidation of Florida's capital sentencing scheme- (1) that life without parole is the statutory maximum penalty for first degree murder,

[10] Additionally, the Supreme Court has held that only those rules that seriously enhance accuracy are applied retroactively. Graham v. Collins, 506 U.S. 461, 478, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993). Jury involvement in capital sentencing does not enhance accuracy, and the Ring Court only found that the Sixth Amendment requires juries regardless of whether they are more rational or fair. Thus, the fact that Ring does not seriously enhance accuracy also demonstrates that it should not be applied retroactively. See Colwell v. State, 59 P.3d 463 (Nev. 2002)(The Nevada Supreme Court declined to apply Ring retroactively on collateral review noting that Ring is based on the Sixth Amendment right to a jury and not improved accuracy in sentencing).

(2) that a unanimous jury verdict is required in the penalty phase, (3) that the jury is required to make specific findings as to aggravating factors, and (4) that the prior violent felony aggravator is not an exception to the rule in Ring and Apprendi.

(1) STATUTORY MAXIMUM

Prior to Ring, this Court addressed the question of the maximum sentence in capital murder cases. Mills v. Moore, 786 So.2d 532, 536-537 (Fla.2001). In Mills, the defendant argued that the statutory maximum was life, not death. This Court disagreed holding that, according to the plain language of the statutes, the statutory maximum was "clearly death." Id. at 538.

In so doing, this Court noted that both § 775.082 and § 921.141 clearly refer to a "capital felony." A "capital felony" is by definition a felony that may be punishable by death. This Court has recently reaffirmed the holding in Mills. Porter v. Crosby, 28 Fla. L. Weekly S33, 34 (Fla. January 9, 2003) (stating: "we have repeatedly held that maximum penalty under the statute is death and have rejected the other Apprendi arguments).[11] Thus, the Defendant is incorrect in this

[11] See also Cox v. State, 819 So. 2d 705 (Fla. 2002); Conahan v. State, 28 Fla. L. Weekly S70a (Fla. January 16, 2003); Spencer v. State, 28 Fla. L. Weekly S35 (Fla. January 9, 2003); Fotopoulos v. State, 27 Fla. L. Weekly S1 (Fla. December 19, 2002); Bruno v. Moore, 27 Fla. L. Weekly S1026 (Fla.

assertion.

(2) UNANIMITY

The Defendant also claims that the jury's verdict during the penalty phase should be unanimous. However, in Bottoson, this Court rejected Ring-based attacks on Florida's death penalty procedures. In fact, the sole holding of Bottoson is that the United States Supreme Court has previously upheld Florida's capital punishment statutes and did not rule otherwise in Ring. Hence, this Court left the prerogative of overruling its own decisions to the United States Supreme Court. Justice Wells, Quince and Harding all concurred in this reasoning, as did Justice Pariente, making a majority of four of the seven Justices. Thus, because jury unanimity has never been required in Florida penalty phase verdicts and because no change has been made to Florida law by Ring, the Defendant's argument is without support.

Additionally, the Defendant's argument lacks historic support. The United States Supreme Court first applied the Sixth

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December 5, 2002); Bottoson v. Moore, 813 So. 2d 31, 36, (Fla. 2002), cert. denied, 122 S. Ct. 2670 (2002); Hertz v. State, 803 So. 2d 629, 648 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Looney v. State, 803 So. 2d 656, 675 (Fla. 2001), *cert. denied*, 122 S. Ct. 2678 (2002); Brown v. Moore, 800 So. 2d 223, 224-225 (Fla. 2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, 122 S. Ct. 2669 (2002); Mills v. Moore, 786 So. 2d 532, 536-38, cert. denied, 532 U.S. 1015 (2001).

Amendment right to a jury trial to the States in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). However, the United States Supreme Court has declined to constitutionalize a "jury" to mean twelve persons or unanimous verdicts. In Williams v. Florida, 399 U.S. 78, 103, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Court held that a six member jury in felony cases did not violate the Sixth Amendment right to a jury trial. The Williams Court referred to the twelve person requirement as a "historical accident" that was "unrelated to the great purposes which gave rise to the jury in the first place." Williams v. Florida, 399 U.S. at 89-90, 90 S.Ct. at 1900. Two years later, in Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), the United States Supreme Court held that conviction by less than unanimous verdicts did not violate the right to a jury trial. However, in Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the United Supreme Court, while agreeing with the Louisiana Supreme Court that the question was a "close" one, required unanimity in a jury of six. Hence, the only federal constitutional requirement of unanimity is that a jury of six must be unanimous. Nor does Florida's constitution require unanimity. Flanning v. State, 597 So.2d 864 (Fla. 3d DCA

1992)(noting that the Florida Constitution has never been interpreted to require a unanimous verdict).

In fact, the Defendant cites no support for his unanimity argument, but simply "prays the court recognize that, under Florida Law, a unanimous jury verdict is required for fact-finding in criminal cases." (Amended Brief of Appellant at 73). Because, his position is unsupported, it should be denied.

Finally, it must be noted that in this case the jury **did** make an unanimous determination as to one aggravator (that the murder was committed during the course of a robbery, sexual battery and kidnaping) when it convicted the Defendant of the felonies in counts II-IV which occurred contemporaneous with the murder. See Norcross v. State, 2003 WL 261817, *7 (Del. 2003) (holding that Ring is satisfied if a jury finds, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating circumstance, whether in the guilt **or** penalty phase). **(3) SPECIFIC WRITTEN FINDINGS**

Next, the Defendant raises, by way of questioning the continuing validity of Hildwin v. Florida, 490 U.S. 638 (1989), the issue of whether specific written findings are necessary. However, as noted by Justices Wells and Quince in Bottoson, Ring did not overrule the holding in Hildwin. Accordingly, Hildwin, which holds that a Florida sentencing jury does not have to

state its findings of aggravation in writing, is still viable law.

Florida courts have repeatedly held that Florida law does not require written findings from the jury in either the guilt or penalty phase. Cox v. State, 2002 WL 1027308 (Fla. 2002)(rejecting claim that pursuant to Apprendi the jury constitutionally must make specific written findings); Fotopoulos v. State, 608 So.2d 784, 794 n.7 (Fla. 1992); Steverson v. State, 787 So.2d 165, 167 (Fla. 2d DCA 2001), citing, Kearse v. State, 662 So.2d 677, 682 (Fla.1995) and O'Callaghan v. State, 429 So.2d 691, 695 (Fla.1983).

(4) RECIDIVIST AGGRAVATORS

As his final point, the Defendant argues that recidivist aggravators should not be exempt from the holding in Ring. However, the Defendant is again incorrect.

Ring was an expansion of the holding in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which explicitly exempted recidivist factual findings from its holding. Id. at 2362-63 (holding, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt). Thus, because Ring stems from Apprendi, any aggravator that depends on the fact of

a prior conviction is exempted from Ring. Ring v. Arizona,122 S.Ct. at n.4 (noting that none of the aggravators at issue related to past convictions and that, therefore, the holding in Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which allowed the judge to find the fact of prior conviction even if it increases the sentence beyond the statutory maximum was not being challenged).

Accordingly, all recidivist aggravators may be found solely by the judge. The prior violent felony aggravator and the under sentence of imprisonment aggravator are recidivist aggravators. In the present case, both the under sentence of imprisonment and the prior violent felony aggravators were found. The Defendant escaped from prison in North Carolina and was on the run when he and the co-defendant killed the victim. Furthermore, the trial court found that the Defendant had committed the prior violent felonies of aggravated assault on a law enforcement officer and two robberies.[12] As noted in Bottoson, the finding of a prior

[12] See Jones v. State, 791 So.2d 580 (Fla. 1st DCA 2001)(joining the Third, Fourth and Fifth District Courts of Appeal in rejecting an Apprendi challenge to the constitutionality of the habitual offender statute); Saldo v. State, 789 So.2d 1150 (Fla. 3d DCA 2001) (stating that a careful reading of Apprendi refutes claim that proof of prior criminal convictions must be submitted to the jury); Gordon v. State, 787 So.2d 892 (Fla. 4th DCA 2001) (rejecting claim that defendant is entitled to have a jury determine, beyond a reasonable doubt, the existence of predicates necessary for imposing a habitual offender sentence); Wright v. State, 780 So.2d 216 (Fla. 5th DCA

violent aggravator, by itself, means that Ring does not apply. See also King v. Moore, 2002 WL 31386234, 27 Fla. L. Weekly S906 (Fla. Oct. 24, 2002)(Justices Shaw and Pariente affirming because of prior violent felony aggravator).

In conclusion, the Defendant has failed to show that he has preserved his right to raise any issue under Ring, that Ring has any application to his death sentence, or that his death sentence was obtained in violation of Ring.[13]

CONCLUSION

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

2001) (holding that the findings required under the habitual offender statute fall with Apprendi's "recidivism" exception)).

[13] This Court has repeatedly and consistently denied relief requested under Ring. See, King v. Moore, 831 So. 2d 143 (Fla. 2002); Bottoson v. Moore, 813 So. 2d 31_(Fla. 2002), cert. denied, 122 S.Ct. 2670 (2002); Marquard v. State/Moore, _So. 2d_, 27 Fla. L. Weekly S973 n. 12 (Fla. 2002) (As in King and Bottoson, defendant not entitled to relief); Chavez v. State, _So. 2d_, 27 Fla. L. Weekly S991, 1003 (Fla. 2002); Bruno v. Moore, _So. 2d_, 27 Fla. L. Weekly S1026, 1028 (Fla. 2002); Fotopolous v. State/Moore, _So. 2d_, 28 Fla. L. Weekly S1, 5 (Fla. 2003); Lucas v. State/Moore, _So. 2d_, 28 Fla. L. Weekly S29, 32 (Fla. 2003); Spencer v. State/Crosby, _So. 2d_, 28 Fla. L. Weekly S35, 41 (Fla. 2003); C. Anderson v. State, _So. 2d_, 28 Fla. L. Weekly S___ (Fla. 2003); Doorbal v. State, 2003 WL 193499 (Fla. Jan. 30, 2003).

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charles E. Lykes, Jr., Attorney for Appellant, 501 S. Ft. Harrison Ave., Suite 101, Clearwater, Florida 33756, by U.S. Mail on this ____ day of February, 2003.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
By: GARY MILLIGAN
Attorney for State of Florida

Assistant Attorney General
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300
(850) 487-0997 (Fax)

Florida Bar No. 059617

CERTIFICATE OF COMPLIANCE

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

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Gary Milligan
Attorney for State of Florida