IN THE SUPREME COURT OF FLORIDA

GROVER REED,

Appellant,

CASE NO. SC02-2191

v.

STATE OF FLORIDA,

Appellee.

_____
/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE APPELLEE

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE AND FACTS

This is an appeal of a trial court's denial of a motion for post-conviction relief following an evidentiary hearing.

Reed was convicted of first degree murder, sexual battery and robbery after jury trial on November 20, 1986. This Court summarized the facts of the crime as:

> In December of 1985 Reed, accompanied by his woman friend and two young children, arrived in Jacksonville homeless and destitute. Through Traveler's Aid they were given shelter in the home of the Reverend Ervin Oermann, a Lutheran minister. They stayed with Reverend Oermann and his wife, Betty, for just over a week but were asked to leave when Reverend Oermann discovered that Reed had drug paraphernalia. However, Reed continued to receive aid from the Oermanns in the form of money and transportation. Eventually the Oermanns began to feel they were being used and withdrew all support. Reed resented the discontinuance of aid and vowed to get even.
>
> On February 27, 1986, Reverend Oermann returned home from a night class and found his wife, Betty, dead on the living room floor. An autopsy showed she had been strangled, raped, and stabbed repeatedly in the throat. Found in the house was a distinctive baseball cap. For some time this cap was the only lead police had, so they produced a television recreation of the crime and showed the cap. One viewer recognized the cap as being much like one Reed wore. Further investigation revealed that Reed was last seen wearing his cap on the day Mrs. Oermann was killed. Ultimately, he was arrested.
>
> The most significant evidence of Reed's guilt may be summarized as follows:
>
> (a) Witnesses said they had seen Reed wearing his baseball cap on the day of the murder before the probable time of death but not thereafter. They positively identified the cap as Reed's because of the presence of certain stains and mildew.
>
> (b) Reed's fingerprints were found on checks that had been taken from the Oermann home and had been found in the yard.
>
> (c) An expert witness gave testimony that hairs found on the body and in the baseball cap were consistent with Reed's hair.

(d) Another expert witness gave testimony that the semen found in the body could have been Reed's.

(e) Reed's cellmate, Nigel Hackshaw, gave testimony that Reed had admitted breaking into the Oermann house and killing Mrs. Oermann.

Reed v. State, 560 So.2d 203, 204 (Fla. 1990)

The jury found Reed guilty. Neither the State nor the defendant presented additional evidence in the penalty phase. The jury recommended death eleven to one. The trial court considered the PSI and mitigating evidence, such as Reed's medical record verifying his substance abuse, prior to sentencing. On January 9, 1987, Judge Southwood sentenced Reed to death finding six aggravating circumstances: (1) prior violent felony conviction; (2) felony murder; (3) avoid arrest; (4) pecuniary gain; (5) HAC; and (6) CCP. Judge Southwood found no statutory or nonstatutory mitigating circumstances and concluded that "sufficiently compelling aggravating circumstances exist to justify and require the imposition of the death penalty."

Reed appealed to the Florida Supreme Court. His initial brief raised only one issue which was a racial bias in jury selection claim. That brief was stricken as insufficient by the Florida Supreme Court. A new brief was filed by the public defender which raised the original issue plus five additional issues: (2) a claim that the trial court erred by allowing trial counsel to waive lesser included offense instructions to the robbery and sexual battery counts; (3) a *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) claim; (4) a claim that the trial court improperly found the prior violent felony,

avoid arrest, HAC and CCP aggravators; (5) a claim that the trial court erred in refusing to instruct the jury as to the substantial impairment mitigator; and (6) a *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) claim that the trial court erred in considering victim impact information contained in the presentence report. The Florida Supreme Court initially reversed the conviction based on the jury selection issue but on rehearing affirmed the judgment and sentence. *Reed v. State*, 560 So.2d 203 (Fla. 1990). In its opinion, the Florida Supreme Court held: (1) given the circumstances that both the defendant and the victim were white, that two black jurors were seated, and that the prosecutor's explanations were facially legitimate, the trial judge did not abuse his discretion in finding that jurors were not challenged because of their race; (2) the *Caldwell* claim was not preserved for appeal and was meritless because the prosecutor and the trial court correctly stated the law; (3) the trial judge did not abuse his discretion in refusing to instruct the jury on intoxication; (4) trial counsel could waive jury instructions on lesser included offenses without a personal on the record waiver by the defendant; (5) any error in the consideration by the trial judge of victim impact evidence was not preserved and also harmless error because the jury did not hear the statement;[1] (6) although

[1] The statement was the husband's opinion that death was the appropriate penalty contained in the PSI. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991) overruled *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987) and *South Carolina v. Gathers*,490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) and held that

the prior violent felony and CCP aggravators were stricken, there was sufficient evidence to support both the HAC and avoid arrest aggravators, and, finally, (7) the elimination of two of the aggravating circumstances would not have affected Reed's sentence.

The United States Supreme Court denied Reed's petition for certiorari. *Reed v. Florida*, 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990).

On February 28, 1992, Reed filed a 3.850 motion to vacate his conviction and death sentence. A supplemental 3.850 motion was filed on July 20, 1992. On August 25, 1992, the trial court denied relief without a hearing. Reed appealed to the Florida Supreme Court. *Reed v. State*, 640 So.2d 1094 (Fla. 1994). The Florida Supreme Court found that the prosecutor's closing arguments claim was procedurally barred because it could have been raised on direct appeal. *Reed*, 640 So.2d at 1095. The Court also found that the issue of the jury instructions on the aggravating circumstances was meritless because the Court had previously determined in the direct appeal that any error was harmless. *Reed*, 640 So.2d at 1096. The *Reed* Court held that the

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victim impact evidence was admissible in capital sentencing proceedings. However, *Payne* did not overrule that part of *Booth* that held "that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne*, 501 U.S. at 830 n. 2, 111 S.Ct. at 2611 n. 2. The Florida Supreme Court has observed that statements regarding the appropriate penalty are still not admissible. *Farina v. State*, 680 So.2d 392, 399 (Fla. 1996). However, as the Florida Supreme Court held, the error was harmless because only the judge read the statement, not the jury.

claim that the aggravating circumstances jury instructions were vague as procedurally barred because such an issue should have been raised in the direct appeal not on collateral review. *Reed*, 640 So.2d at 1096. The Florida Supreme Court found that the jury instructions at the penalty phase of the trial had not improperly shifted the burden and that Reed's claim of cumulative error properly had been summarily denied. *Reed*, 640 So.2d at 1098, n.4. However, the Florida Supreme Court held that an evidentiary hearing was required on the allegations of ineffective assistance of counsel and the public records claims. *Reed*, 640 So.2d at 1096, 1097-98.

On February 12, 1996, Reed filed a second supplemental or amended 3.850 motion. On May 28, 1996, the trial court held a hearing where it determined that Reed's attorney's files were not privileged and order copies delivered to the State.[2] On May 28, 1996, Reed filed a Consolidated Supplemental and/or Amended Motion to Vacate Judgments of Conviction and Sentence, in which he presented fourteen claims: (1) a contention that Reed is entitled to public records disclosure; (2) an ineffective assistance of counsel claim for failure to object to the prosecutor's use of allegedly race-based exercise of peremptory challenges; (3) an ineffective assistance of counsel at the

[2] Reed appealed this determination. The Florida Supreme Court affirmed on August 27, 1997. *Reed v. State*, 701 So.2d 868, (Fla. 1997). Reed then filed a writ of prohibition based on Judge Olliff's denial of Reed's third motion to disqualify. Reed sought to disqualify the third judge due to the judge's plans to run for State Attorney. The Florida Supreme Court denied the writ of prohibition on December 20, 1999. *Reed v. State*, 751 So.2d 51(Fla. 1999).

guilt phase of his trial on numerous grounds; (4) a claim that Reed is innocent based upon the serology evidence; (5) an ineffective assistance of counsel for concedingd guilt to a lesser included offense and counsel's admission to one of the aggravating circumstances; (6) an ineffective assistance of counsel claim for failing to object to the introduction of allegedly irrelevant guilt phase testimony and nonstatutory aggravating evidence; (7) an ineffective assistance of counsel claim for failing to present mitigating evidence during the penalty phase of the trial; (8) a claim that counsel was ineffective for not consulting with a confidential mental health expert and for failing to provide information to the mental health expert; (9) a claim that the jury instruction on weighing aggravating and mitigating circumstance impermissibly shifted the burden; (10) a claim that Reed's death sentence rests upon an unconstitutional automatic aggravating circumstance of felony murder; (11) a claim that the harmless error analysis conducted by the Florida Supreme Court on direct appeal was inadequate; (12) a claim that all of Reed's claims, whenever made, and in whatever proceeding, should be considered in the aggregate for cumulative error; (13) a claim that the trial court's instructions defining the HAC and CCP aggravators were unconstitutionally overbroad; and (14) a claim of newly-discovered evidence based upon the recantation of a State witness. The Attorney General's Office filed a response on July 12, 1996.

A new judge was assigned to this case in 2001. The trial court order updated responses. The Attorney General's Office filed an updated response on July 24, 2001, agreeing to an evidentiary hearing to seven of the claims. The trial court held a *Huff* hearing on August 8, 2001, and granted an evidentiary hearing on most of the claims. The trial court held an evidentiary hearing from February 19 through February 22, 2002. The defendant did not testify at the evidentiary hearing. The State offered to conduct DNA testing, provided it still had the rape kit, but the defendant declined the offer. (Order at 3). The trial court ordered the parties to submit post-evidentiary memoranda. The Attorney General's Office filed its memo on April 12, 2002. The trial court entered an order denying all postconviction relief on August 26, 2002. The trial court found:

> At the outset of this consideration, it should be noted that trial counsel in this matter at the time of the trial was, and remains, an experienced defense attorney, well known to the Bar in this circuit. By the time he represented the defendant, he had spent many years as an assistant state attorney and perhaps as many years as criminal defense counsel. According to his testimony at the evidentiary hearing, he had been involved in fifteen(15) to twenty (20) murder cases, most of which involved the death penalty, before he had actually undertaken the defendant's representation. He was appointed to represent the defendant because a conflict occurred with the public defender's original representation of the defendant. This Court finds his testimony at the evidentiary hearing to be credible and plausible, and that it revealed sound tactical and ethical decisions on his part, many of which were occasioned by the defendant's statements to him regarding the crime itself, and, equally important, the defendant's instructions to trial counsel as to how to proceed.
>
> This court finds that trial counsel's decisions regarding the defense of this case devolved from counsel's conclusions that the defendant had admitted to him that the defendant was, in fact, responsible for the rape and

murder of Mrs. Oermann. (See, 1.11, p. 199 through 1.10, p. 204, evidentiary hearing (hereafter "E.H."), February 21, 2002). During the course of trial counsel's contact with the defendant, the defendant suggested to trial counsel that there had been consensual sex with the victim and that someone else had killed her. When questioned regarding his fingerprint on the victim's check found in the backyard, the defendant generally commented that he wasn't aware that he had dropped the check. When confronted with the testimony of Nigel Hackshaw reporting the defendant's jailhouse confession, the defendant acted surprised and suggested that he did not expect the witness to cooperate, nor that his statement should be repeated. As a further example of the circumstances under which trial counsel was working, when asked about witnesses, which would establish an alibi, the defendant intimated that it would be a waste of trial counsel's time to look further for alibi witnesses.

As a number of the defendant's current claims involve failing to call or consult additional experts, or involve the failure to conduct further investigation, it seems appropriate to note that such failure to further investigate is not necessarily the ineffective assistance of counsel at least in those instances in which the defendant has effectively admitted his guilt to his attorney. See, e.g., ***Gudinas v. State***, 816 So.2d 1095 (Fla. 2002). It seems that this would be particularly so when further investigation or consultation would be fruitless or potentially harmful to the defendant.

There has been **no** suggestion by the defendant's current claims that any of the expert evidence offered against the defendant at trial was invalid or incorrect. Neither has there been any suggestion by the defendant that the retention of additional defense experts would have produced any evidence directly contradicting that offered by the state. In fact, though individuals recognized in their fields, the defendant's experts during the course of the evidentiary hearing, all non-lawyers, really offered nothing more than their comments on the trial performance of experienced defense counsel. As noted below, one of the defendant's evidentiary hearing experts, Dr. Dale Nute, even acknowledged that the matter which he was discussing, had it been offered at the trial, would have produced an implausible, even improbable situation for the jury. Trial counsel is certainly not expected to offer matters which might affect the credibility of himself or his representation of the defendant. The defendant's psychological expert, candidly admitted to the Court that the testimony that he offered during the evidentiary hearing, had it been offered at trial, would likely have revealed to the jury that, in the expert's opinion, the defendant was a person with tendencies to extreme violence, and whose personality disorder made him the perfect candidate for the kind of crimes committed in this

> case. It is certainly not ineffective assistance of counsel for any attorney not to call an expert when doing so causes his client to run the risk of having the state successfully make his client look like a sociopathic killer.

(Order at 5-7).

At the conclusion of its order, the trial court found:

> It is by now axiomatic in the law that in order to establish an ineffective assistance of counsel claim, the defendant must establish two (2) elements. The first, of course, is that the defendant must show that counsel's performance was deficient. The deficiency must be such that the errors committed by counsel were so egregious as to indicate that trial counsel was not performing in the manner of the "counsel" guaranteed by Sixth Amendment to the United States Constitution.
>
> The defendant must further show that if there was such a deficiency, that deficiency led to prejudice to the defendant. This is, the defendant did not receive a fair trial, but a trial whose result was unreliable. Unless the defendant has established both of these elements, it cannot be said that the due process to which he is entitled was violated by the system. ***Strickland v. Washington***, 466 US 668, 104 S.Ct. 2052 80 L.Ed. 2d 674 91984), and its multitudinous progeny.
>
> This Court has deliberated for many weeks on the transcript of the defendant's trial and the testimony at the evidentiary hearing. Upon that deliberation, this Court finally concludes that the defendant has failed to establish such deficiency of performance no the part of trial counsel as would meet the level set by ***Strickland***. As the Court concludes that the defendant has failed to meet the first prong of the ***Strickland*** test, any discussion of the second prong is actually unnecessary. However, given the length of the evidentiary hearing and the matters presented therein, this Court also concludes that the defendant has failed to establish (even in the light most favorable to him) that there would have been any different result for the defendant.

(Order at 35-36).

SUMMARY OF ARGUMENT

ISSUE I - The trial court properly summarily denied this claim.

ISSUE II - The trial court properly denied this ineffectiveness claim following an evidentiary hearing.

ISSUE III - The trial court properly denied this ineffectiveness claim following an evidentiary hearing.

ISSUE IV - The trial court properly denied this ineffectiveness claim following an evidentiary hearing.

ISSUE V - The trial court properly denied this ineffectiveness claim following an evidentiary hearing.

ISSUE VI - The trial court properly denied this *Brady* claim following an evidentiary hearing.

ISSUE VII - The trial court properly denied this ineffectiveness claim following an evidentiary hearing.

ISSUE VIII - The trial court properly found this ineffectiveness claim abandoned.

ISSUE IX - The trial court properly found this ineffectiveness claim abandoned.

ISSUE X - The trial court properly denied this ineffectiveness claim following an evidentiary hearing.

ISSUE XI - The trial court properly summarily denied this claim.

ISSUE XII - The trial court properly found this ineffectiveness claim abandoned.

ISSUE XIII - The trial court properly found no cumulative ineffectiveness.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR'S PEREMPTORY CHALLENGE TO SEVERAL AFRICAN-AMERICAN JURORS? (Restated)

Reed asserts that the trial court improperly failed to hold an evidentiary hearing on his ineffective assistance of counsel for failing to object the prosecutor's use of peremptory challenges to strike eight black jurors claim. The State respectfully disagrees. Trial counsel was not ineffective. Trial counsel objected to the prosecutor's use of peremptory challenges. This Court rejected the claim on the merits, not because it was not properly preserved. The trial court properly denied an evidentiary hearing on this issue which had been addressed on the merits by this Court in the direct appeal. The record conclusively refutes this claim of ineffectiveness and therefore, the trial court properly denied the claim without an evidentiary hearing.

The trial court's ruling

The trial court summarily denied this claim.

Procedural Bar

This claim is procedurally barred by the law of the case doctrine. Reed raised the prosecutor's use of peremptory challenges in his direct appeal. *Reed v. State*, 560 So.2d 203 (Fla. 1990)(holding defendant failed to make prima facie showing that jurors were challenged by prosecution because of their race). The Florida Supreme Court has repeatedly held that a defendant may not relitigate the same claim litigated on direct

appeal by couching the claim in terms of ineffective assistance of counsel. *Asay v. State,* 769 So.2d 974, 989 (Fla. 2000)(rejecting claims in a post conviction motion that should have been raised on direct appeal because it was “an attempt to relitigate procedurally barred claims by couching them in terms of ineffective assistance of counsel.”); *Valle v. State*, 705 So.2d 1331, 1336, n. 6 (Fla.1997); *Cherry v. State*, 659 So.2d 1069, 1072 (Fla.1995). Collateral counsel is attempting to reopen the direct appeal. Indeed, this claim is properly viewed as a thirteen year old motion for rehearing.

The standard of review

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

Merits

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable. Cf. *Spencer v. State*, 28 Fla. L. Weekly S35, (Fla. 2003)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The *Strickland* standard requires establishment of both prongs. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one."). The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

The ineffectiveness of trial counsel claim is meritless. At the end of jury selection, defense counsel stated “there are very few blacks on the jury.” (XI 305). Defense counsel noted that there were two blacks on the jury. (XI 305). The trial court then noted that, in the first group of 21 persons, there were six blacks and in the second set of 21 persons there were seven blacks. (XI 306). Defense counsel then stated that the State used eight of their ten peremptory challenges to excuse blacks. (XI 306). Trial counsel then moved for a mistrial “based on the fact that the peremptories have been used in such a fashion as to systematically exclude blacks”. (XI 308). The prosecutor then justified his use of peremptories against the prospective jurors going juror by juror based mainly on immaturity, unemployment/underemployment or having a prior arrest record. The trial court then denied the motion. (XI 308-314). The trial court then asked defense counsel if he had any

argument and he responded no. (XI 314). The trial court then explained that approximately 25% of the population was black and that, with the two black jurors on the jury, the jury was approximately 16% black (XI 315). The trial court also noted that both the victim and the defendant were white. (XI 315). The trial court then found "that the challenges exercised against the blacks are not based purely upon race or racial discrimination" and denied the motion. (XI 315)

First, counsel cannot be said to be ineffective for failing to do something that he did. Trial counsel did indeed object. Trial counsel made a motion for mistrial. The record conclusively refutes this claim of ineffectiveness. ***Gudinas v. State***, 816 So.2d 1095, 1101 n. 6 (Fla.2002)(finding no error in trial court's summarily denying legally sufficient claim if the claim was conclusively refuted by trial record). The Florida Supreme Court did not reject this claim because it was not preserved; rather; the ***Reed*** Court reached the merits of the issue.

Reed asserts that counsel was ineffective for failing to challenge the prosecutor's justifications of his strikes. Reed mainly focused, in his 3.850 motion, on three peremptory challenges used against three prospective jurors: Mr. Strickland, Mr. Adams and Ms. Humphries. There is no possible prejudice to Reed regarding two of these challenges. Two of the three prospective jurors were prospective alternate jurors only.

Both Mr. Strickland[3] and Mr. Adams[4] were stricken as alternates. (XI 304-305). No alternates sat in this jury. There is absolutely no prejudice to Reed regarding the striking of these two jurors. They would not have decided the case. Thus, Reed cannot meet the prejudice prong of *Strickland* for striking of alternates.

The only actual prospective juror stricken, Ms. Humphries, was unemployed. (XI 124). The prosecutor struck her "because she was totally unemployed" and the prosecutor was aware that there was a real demand for physical therapists (XI 311). In *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995), the United States Supreme Court held that the prosecutor's proffered reason for striking the juror need not be particularly persuasive, or even plausible, so long as it is race neutral. The Florida Supreme Court has adopted this position as well. *Melbourne v. State*, 679 So.2d 759 (Fla.1996).

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[3] Mr. Strickland had a cousin that was convicted of bank robbery and prosecuted in Duval County. (XI 275). The prosecutor struck him because he was underemployed. (XI 313). Mr. Strickland was a messenger at a hospital and had remained merely a messenger after four years. Underemployment is a valid race neutral reason. *Wollmann Engineering, Inc. v. Mactronix, Inc*., 161 F.3d 16 (9th Cir. 1998)(affirming strike of Chinese woman because she was underemployed relative to her level of education).

[4] Mr. Adams was involved in the plumber's union and the prosecutor had had prior experience with that union. (XI 314). Belonging to a union is a race neutral reason. *Ross v. State*, 665 N.E.2d 599, 602 (Ind. App. 1996)(upholding prosecutor's strike of a prospective black juror who was struck because she was a union representative and her negative body language because the reasons were race neutral under *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)).

Unemployment is a valid race neutral reason to strike a prospective juror. *Files v. State*, 613 So.2d 1301, 1304 (Fla.1992)(approving strike of divorced, unemployed, African-American mother of five because "excusing a juror for having no visible means of support has been a basis for parties, in both civil and criminal proceedings, to peremptorily excuse a prospective juror").

There is no prejudice to Reed as required to prove ineffectiveness. When the trial court pointed out to the prosecutor that she was on worker's compensation, this did not change the prosecutor's mind. (XII 311). Had counsel attempted to question Ms. Humphries regarding the reasons for her unemployment as Reed now suggests, the prosecutor would have remained free to strike Ms. Humphries based on her unemployment regardless of the reasons for that unemployment. The end result would have been the same - the prosecutor would have still stricken her. Thus, because the outcome would have been the same, there is no prejudice to Reed from counsel's not attempting to rehabilitate Ms. Humphries.

Furthermore, as the Florida Supreme Court noted, the actual jury contained two African Americans. *Reed v. State*, 560 So.2d 203, 206 (Fla. 1990)(finding the trial court did not err in part because two black jurors were already seated). Thus, regardless of any attempt by counsel to develop the record concerning these three stricken jurors, the Florida Supreme Court would have

affirmed the trial court's denial of the motion for mistrial.[5]

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[5] Although the presence of African-Americans on the jury does not preclude a *Batson* challenge, it is a significant factor which the trial court can consider in determining whether the prosecutor has used his peremptory challenges in a race neutral manner. *United States v. Dennis*, 804 F.2d 1208, 1211 (11th Cir. 1986)(stating that the unchallenged presence of two blacks on the jury undercuts any inference of impermissible discrimination from the prosecutor's use of three of the four peremptory challenges to strike blacks); *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir.1990)(rejecting a *Batson* challenge where the jury contained two blacks because their unchallenged presence undercuts any inference of impermissible discrimination);*United States v. Jiminez*, 983 F.2d 1020, 1023 (11th Cir. 1993)(noting that the presence of blacks on the jury was "significant" in reviewing the district court's denial of a *Batson* challenge);*United States v. Puentes*, 50 F.3d 1567, 1578 (11th Cir. 1995)(explaining that although the presence of African-American jurors does not dispose of an allegation of race-based peremptory challenges, it is a significant factor tending to prove the paucity of the claim and finding a *Batson* claim "meritless" because the jury contained four African-Americans.). Other federal circuits agree with the Eleventh Circuit. *United States v. Williamson*, 53 F.3d 1500,1510 (10th Cir. 1995)(explaining that although the mere presence of members of a certain race on the final jury does not automatically negate a *Batson* violation, ... it can be a relevant factor, particularly when the prosecution had the opportunity to strike them.); *United States v. Marin*, 7 F.3d 679, 686, n. 4 (7th Cir.1993)(concluding that while accepting one minority on the jury does not negate a Batson challenge but explaining that this does not mean that the trial court should ignore the fact that the government had not objected to the seating of another juror of the same race); *United States v. Hughes*, 970 F.2d 227, 232 (7th Cir. 1992)(concluding the fact that two of four blacks on the venire were empaneled weakens argument that government's strikes were based on a motive to discriminate); *United States v. Mixon*, 977 F.2d 921, 923 (5th Cir. 1992)(observing that the fact the jury contained one black weakens the argument that the government was accepting jurors solely on a racial basis). Florida Courts are beginning to accept this position as well. *Heggan v. State*, 745 So.2d 1066, 1069 (Fla. 3d DCA 1999)(explaining the fact that the prosecutor had accepted two other African-Americans on the jury was relevant to, although by no means dispositive of, the trial judge's assessment of the genuineness of the prosecutor's stated

Reed cannot establish any prejudice.

ISSUE II

DID THE TRIAL COURT ERR IN FINDING NO INEFFECTIVENESS OF COUNSEL WHERE COUNSEL DECIDED NOT TO PRESENT THE TESTIMONY OF A HAIR EXPERT? (Restated)

Reed contends that his trial counsel was ineffective for failing to consult and present that testimony of a hair expert. The State respectfully disagrees. There was no ineffectiveness. There was neither deficient performance nor prejudice. It is not deficient performance to decline to investigate the scientific evidence of guilt when the client admits his guilt. As the trial court found, the evidentiary hearing testimony failed to indicate that there was anything incorrect about the hair evidence presented at trial and therefore no prejudice. Thus, the trial court properly denied this claim of ineffectiveness after an evidentiary hearing.

The trial court's ruling

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reason); *Reed v. State*, 560 So.2d 203, 206 (Fla. 1990)(finding the trial court did not err in part because two black jurors were already seated); *Melbourne v. State*, 679 So.2d 759, 764 (Fla.1996)(receding from *State v. Slappy*, 522 So.2d 18 (Fla. 1988) and observing that peremptories are presumed to be exercised in a nondiscriminatory manner and the right to an impartial jury is best safeguarded not by an arcane maze of reversible error traps, but by reason and common sense); but see *Bryant v. State*,565 So.2d 1298, 1301(Fla. 1990)(rejecting the argument that the fact that the actual jury contained six black persons establishes that the prosecution did not exclude persons because of race based on *United States v. Gordon*, 817 F.2d 1538, 1541 (11th Cir.1987); *Tillman v. State*, 522 So.2d 14 (Fla.1988) (stating that the state accepted one black to serve on a panel was of no consequence).

As the Court noted, many of the tactical decisions trial counsel made regarding this case flowed from the fact that the defendant had basically admitted the crime to him. (Order at 5-6). The trial court noted that it is not ineffective for counsel to consult or present experts where the defendant admitted his guilt citing ***Gudinas v. State***, 816 So.2d 1095 (Fla. 2002), particularly when further investigation would be fruitless or harmful. (Order at 6).

The trial court noted that there was no evidence presented at the evidentiary hearing that the scientific evidence presented at trial was invalid. (Order at 6). The trial court noted that the hair expert presented at the evidentiary hearing "really offered nothing more than their comments on the trial performance of experienced defense counsel" and that the expert acknowledged that his explanation was "implausible, even improbable". (Order at 6-7).

The trial court ruled that Dr. Nute was "not really credible given his lack of expertise." (Order at 7).

The trial court ruled:

> Dr. Nute's testimony failed to offer anything to indicate that there was anything incorrect about the state's hair evidence at the trial or that there was anything detrimental about the manner in which it was presented. At best, Dr. Nute's suggestions were that he could have provided a "plausible but not very probable" explanation of ways that the defendant's pubic hair could have been associated with the victim's body and the location at which it was found.
>
> Furthermore, Dr. Nute's hearing testimony really failed to offer anything about hair, shedding hairs, or the transference of shedding hairs that would not already be known by an experienced criminal defense lawyer. Lastly, by way of observation, it seems that Dr. Nute may have placed more importance on his post-trial consideration of the presence of hair consistent with that of the defendant

> in the soft drink cap than was actually warranted. The trial transcript indicates that the more weighty issue was that the cap itself was positively identified as that of the defendant and that it was last seen in his possession on the day of the murder.

(Order at 7-8).

Evidentiary hearing testimony

Dr. Nute, a professor of criminology, testified at the evidentiary hearing. (EH Feb 19 at 108-188). While he is not a hair examiner "per se", he had previously worked supervising the training for microscopic hair analysis. (EH Feb 19 at 111). Dr. Nute admitted that he had never completed the training required to become a hair analyst. (EH Feb 19 at 111). Dr. Nute examined the reports, the depositions and trial transcripts of the experts' testimony in this case. (EH Feb 19 at 113). Dr. Nute opined that the pubic hair was the "single most critical piece of evidence" but it could not be explained as easily as a head hair. (EH Feb 19 at 119). Dr. Nute stated that his advice would have been to have the hair re-examined. (EH Feb 19 at 119). Dr. Nute characterized the testimony of Dr. Luten, the hair expert, at the trial, as "very straightforward". (EH Feb 19 at 121). Dr. Nute believed the prosecutor had "misphrased" a question by using the word remote to describe the possibility that the hair could have come from someone else and the result was an "overstatement" by the prosecutor of the hair expert's findings. (EH Feb 19 at 120-122, 125). Dr. Nute stated that this exchange should have been corrected in the minds of the jury by asking the expert on cross whether he agreed with the possibility being labeled remote. (EH Feb 19 at 126). Dr.

Nute asserted that the defendant's fingerprints and head hairs could have been explained by the defendant's previously having lived in the victim's house. (EH Feb 19 at 127). Dr. Nute stated that he could have provided a "plausible but not very probable" explanation of a possible way the defendant's pubic hair could have been transferred without being involved in the rape. (EH Feb 19 at 127). Dr. Nute would have suggested that the pubic hair could have been transferred by the victim having sat on the bed where the defendant slept while she was not wearing any clothes. (EH Feb 19 at 128). This also required that the bed had not be cleaned up. (EH Feb 19 at 128). Dr. Nute opined that if he had been retained he could have explained the defendant's hair on the Dr. Pepper cap because "you can always come up with a possible scenario" due to the ease with which head hairs are shed. (EH Feb 19 at 128-129).[6]

Reed rested his case without calling trial counsel to the stand. (EH Feb. 21 at 178). However, the State presented Mr. Nichols, Reed's trial counsel, as their witness. (EH Feb. 21 at 179,187-188). Trial counsel's strategy for dealing with the hair evidence was also to suggest that the hairs may have been left during the time Reed was living with the victim rather than during the crime. (EH Feb. 21 at 194). The State's hair expert accurately testified as to the state of the science. (EH Feb. 21 at 195).

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[6] Dr. Nute's statement regarding the pubic hair as the most critical piece of evidence may be true if it is limited to the most critical piece of hair evidence. However, the hair evidence was not crucial to the State's case.

Merits

Dr. Nute's suggestion that the victim acquired the defendant's pubic hair on her by sitting nude on the bed that the defendant slept in two months prior to the murder which was in his words "not very probable" is more correctly classified as incredible. Lawyers are not ineffective for refusing to present wild conjectures that will solely undermine their credibility with the jury. Indeed, the opposite is true. Effective attorneys do not present incredible defenses. *Lashley v. Armontrout*, 957 F.2d 1495, 1498 (8th Cir. 1992) (stating that a defense attorney is not ineffective for not presenting an implausible theory of defense and quoting the United States Supreme Court's observation that the Sixth Amendment does not require that counsel do what is impossible and if there is no bona fide defense ..., counsel cannot create one and may disserve the interests of his clients by attempting a useless charade in *United States v. Cronic*, 466 U.S. 648, 656 n. 19, 104 S.Ct. 2039, 2045 n. 19, 80 L.Ed.2d 657 (1984)); *United States v. Ramsey*, 785 F.2d 184 (7th Cir.1986)(rejecting an ineffectiveness claim and observing that an incredible defense may be worse than no defense). Counsel is not ineffective for not wanting to waste his credibility with the jury by presenting such an absurd defense when he would shortly need it in the penalty phase.

As to Dr. Nute's opinion that retaining a hair expert would have been valuable because a hair expert could explain shedding to counsel, counsel did not need such a lecture. As the trial court itself observed, a criminal attorney with several years

experience as both a prosecutor and a defense attorney would already be aware that human hair is shed and its presence can be readily explained. (EH Feb 19 at 132). It is not deficient performance not to hire an expert to explain the simple concept of shedding. Nor is it deficient performance to not hire an expert to retell you what you already know through the testimony of hair experts at numerous other prior trials. Moreover, Dr. Nute seems to misunderstand the significance of the Dr. Pepper cap. Regardless of any hairs located on the cap, the cap itself was the more damning evidence. The cap was left by the perpetrator. The cap was unique or in the Florida Supreme Court's words "distinctive". Mark Rainey identified the cap as the one he had given to the defendant. The victim's husband had never seen the cap, which was discovered next to his wife's body, before. Reed denied owning such a cap; yet, numerous state witnesses testified that he did indeed own such a cap. The fingerprint and baseball cap both were more critical physical evidence. Counsel is not ineffective for recognizing that the hairs found on the cap were the least of his worries.

The *Strickland* court explained:

> Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. at 691, 104 S.Ct. 2052. Here, the defendant admitted his guilt to counsel rendering any need to investigate the scientific evidence of guilt superfluous. *Gudinas v. State*, 816 So.2d 1095, 1102(Fla. 2002)(finding no ineffectiveness for failing to further investigate the DNA in light of Gudinas's incriminating statements about the crime to his attorneys). Hence, counsel was not ineffective.

ISSUE III

DID THE TRIAL COURT ERR IN FINDING NO INEFFECTIVENESS OF COUNSEL WHERE COUNSEL DECIDED NOT TO PRESENT THE TESTIMONY OF A BLOOD EXPERT? (Restated)

Reed asserts that his trial counsel was ineffective for failing to consult and present a serology expert. The State respectfully disagrees. It is not deficient performance to decline to investigate the scientific evidence of guilt when the client admits his guilt. As the trial court found, there was no evidence presented at the evidentiary hearing that the scientific evidence presented at trial was invalid and therefore, no prejudice. Thus, the trial court properly denied this ineffectiveness claim following the evidentiary hearing.

The trial court's ruling

The trial court noted that there was no evidence presented at the evidentiary hearing that the scientific evidence presented at trial was invalid. (Order at 6). The trial court ruled:

> Dr. Nute also testified on the issue of failure to consult with an independent serologist. On the topic of serology, this Court finds Dr. Nute to be an expert. However, the bulk of Dr. Nute's testimony relates to the quality of defense counsel's trial questions, and not the quality of the evidence presented to the jury. While it seems clear that Dr. Nute might, himself, have posed the questions in

> a different way, nothing in his testimony reveals in any way that the evidence presented to the jury was inaccurate, incomplete, or fundamentally unfair to the defendant.
>
> At the time of the trial in this cause, clearly pre-DNA, the analysis of blood and semen was, at best, based on general observations. That is, at that time, it was only possible to advise a jury that a defendant *might* have contributed to collected bodily fluids or that the defendant *probably* did not contribute to collected bodily fluids. The general nature of the science at the time, based on his testimony at the evidentiary hearing, was well known to trial counsel. His consultation with an independent serologist would not have changed the statistical numbers in any way. More importantly, any competent defense serologist would have also had to testify that it was possible that the defendant left his semen within the victim.

(Order at 8-9).

Evidentiary hearing testimony

Dr. Nute, a professor of criminology, testified at the evidentiary hearing. (EH Feb 19 at 108-188). He had previously worked with FDLE as a serologist (EH Feb 19 at 112). He examined the reports, the depositions and trial transcripts of the blood expert's testimony in this case, Dr. Doleman. (EH Feb 19 at 113,133). Dr. Nute stated that he would have explained blood groups and mixtures of semen and vaginal secretions to counsel if he had been retained by defense counsel. (EH Feb 19 at 134). Dr. Nute noted that the experts' trial testimony established that 57% of the male population could have contributed the semen. (EH Feb 19 at 134 referring to trial testimony at 639). Dr. Nute then listed the blood types that could have contributed the semen: (1) an O nonsecretor such as the defendant; (2) an O secretor; (3) an A nonsecretor; (4) B nonsecretor or (5) an AB nonsecretor. (EH Feb 19 at 135). Dr. Nute thought this list "would have had more impact" than just

the number itself. (EH Feb 19 at 135). Dr. Nute testified that while the defendant's O non-secretor type was a possible contributor there was also a possibility that the defendant could have been excluded as a possible donor. The vaginal swab was a mixture of the victim's vaginal secretions and the perpetrator's semen that showed antigen activity. There was no test at the time of the trial in 1986 to distinguish between the perpetrator's semen and the victim's vaginal fluid. (EH Feb 19 at 136-138,144). The assumption was that the antigen activity came from the vaginal fluid. (EH Feb 19 at 136,144). However, Dr. Nute explained that another possibility was that the antigen activity came from the semen as well. (EH Feb 19 at 138, 139). While the victim was a secretor, you cannot assume that the perpetrator was not a secretor. If the antigen activity was from the semen as well as vaginal fluids, then the perpetrator was a secretor. This scenario would have excluded Reed as a possible source because he was a nonsecretor. (EH Feb 19 at 138-140,147). Dr. Nute stated that the possibility of Reed being excluded should have been brought out at trial. (EH Feb 19 at 138). Dr. Nute testified that he would have advised counsel to file a motion to exclude serology evidence because it was "prejudicial" and had "very little probative value". (EH Feb 19 at 141). Dr. Nute also testified that if he had been retained, he could have informed defense counsel that semen can be present in a woman's vagina for hours. (EH Feb 19 at 150). Dr. Nute suggested that the semen could have come from the husband rather than the perpetrator.

At the evidentiary hearing, Steve Platt, who was the director of the FDLE's crime lab, and who was a practicing serologist from 1974 until 1986, testified that he read the State's serologist trial testimony, Paul Doleman. (EH Feb 20th at 89,93). He agreed with Doleman's trial testimony that Reed fell into the 56% of the male population that could have raped the victim. (EH Feb. 20th at 92).

Reed rested his case without calling trial counsel to the stand. (EH Feb. 21 at 178). However, the State presented Mr. Nichols, Reed's trial counsel, as their witness. (EH Feb. 21 at 179,187-188). Trial counsel's strategy for dealing with the semen evidence was to point out that the science of ABO typing was not something that could specifically identify Reed as the source of the semen. (EH Feb. 21 at 195-196). It was one of exclusion and inclusion. Mr. Nichols testified that he was comfortable with the ABO typing science and that it was "pretty simple". (EH Feb. 21 at 196).

Merits

Dr. Nute's testimony was NOT that the 57% figure was incorrect; rather, his opinion was that the figure would have been more effectively presented as a list of possible contributor types than as one simple figure. Dr. Nute is an expert on serology; he is not an expert on how testimony impacts the jury. How to present evidence to a jury is the epitome of trial strategy. Defense counsel could reasonably think that the one figure is more understandable than listing all the possible groups and has more impact because it is simpler. Indeed, Dr.

Nute became confused himself when listing the possible contributor groups. (EH Feb 19 at 135). The one figure encapsulates all the possible groups and conveys more information because it also includes the relative frequency of the groups. Dr. Nute is simply wrong on what has more impact on a jury - simpler always has more impact.

Furthermore, his criticism of the assumption that the antigen activity came from the vaginal fluid, is unwarranted. This is exactly the assumption the NRC (National Research Council) recommends being made in DNA mixture case. Often in rape case, the DNA evidence is a mixture of the perpetrator's semen and the victim's fluids, the widely accepted method of dealing with such mixtures is to type the victim and then subtract her DNA type from the DNA results. In other words, such an assumption is standard practice.

In *Davi v. Class*, 609 N.W.2d 107, 115 (SD 2000), the South Dakota Supreme Court rejected a similar claim of ineffectiveness. The *Davi* Court found that the defendant failed to establish that he was prejudiced by experienced trial counsel's decision not call a serological expert in rape and murder prosecution. The best an expert could have done was raise to 37% the State's figure that 20% of the male population, including defendant, could have left semen in the stain on victim's leg, and the downside was that defense serologist would have confirmed the State's evidence that defendant was a possible contributor of semen.

Here, unlike *Davi*, a defense expert could not have even changed the basic figure given to the jury and would have confirmed the State's percentage of the male population figure. Here, as in *Davi*, the defense expert would have had to agree that Reed was a possible contributor.

As to Dr. Nute's testimony about which motions defense counsel should have filed, this is not within his area of expertise. Dr. Nute is a serology expert, not an attorney. Any motion to exclude the serology evidence because its probative value was substantially outweighed by danger of unfair prejudice would have been denied. § 90.403, Fla Stat. Courts do not exclude scientific evidence where there is a dispute about its interpretation. *Berry v. CSX Transp., Inc.*, 709 So.2d 552(Fla.1st DCA 1998)(holding that expert testimony regarding epidemiology was admissible).

Reed's reliance on *Cox v. State*, 555 So.2d 352 (Fla.1989), is misplaced. In *Cox*, this Court held that the circumstantial evidence of a hair found in the victim's car, O-type blood, a boot print along with bite-mark testimony and Cox's presence in the area, was not sufficient to support a first-degree murder conviction. The *Cox* Court noted that the hair expert testified that the hair was consistent with Cox's hair but also that the hair analysis and comparison are not absolutely certain and reliable. A serologist testified that Cox has type O blood, he also testified that forty-five percent of the population has type O blood. Although a nonexpert testified that the boot print appeared to have been made by a military-type boot and,

although Cox was wearing army boots when admitted to the hospital, his boots were not compared with the boot print. Although a surgical assistant testified that she thought the damage to Cox' tongue was more consistent with someone other than Cox having bitten his tongue, no such tissue was found in the victim or her car. Here, unlike *Cox*, there is fingerprint evidence. Moreover, unlike *Cox*, Reed's "distinctive" cap was found near the victim's body.

Reed's reliance on *Cole v. State*, 700 So.2d 33 (Fla. 5th DCA 1997), is misplaced. While the Fifth District held that defense counsel's blanket policy of not presenting evidence in order to retain first and last closing argument, without examining circumstances and potential defenses of each case, was per se deficient, it also held that defendant did not establish prejudice from counsel's deficient performance. Cole's attorney conducted no depositions of any of the State's witnesses. The *Cole* Court observed that unlike a defense attorney's case-specific tactical decision not to present evidence because of a desire to retain the first and last closing argument in the case, Cole's attorney had a blanket policy regarding first and last closing argument regardless of the circumstances and potential defenses of a particular case. Here, by contrast, trial counsel conducted depositions and never testified that he had a blanket policy regarding presenting evidence. Thus, the trial court properly found no ineffectiveness.

ISSUE IV

DID THE TRIAL COURT ERR IN FINDING NO INEFFECTIVENESS OF COUNSEL FOR FAILING TO CONSULT WITH A FINGERPRINT EXPERT? (Restated)

Reed asserts that trial counsel was ineffective for failing to consult with a fingerprint expert. Trial counsel properly cross-examined the State's fingerprint expert regarding his attempt to date the fingerprint. The facts of the crime "dated" the fingerprint significantly more than any "freshness" testimony from the State's fingerprint expert at trial and therefore, there was no prejudice. Furthermore, the State presented an additional fingerprint expert at the evidentiary hearing who confirmed that the fingerprint was Reed's. Thus, the trial court properly denied this claim of ineffectiveness following the evidentiary hearing.

The trial court's ruling

The trial court noted that there was no evidence presented at the evidentiary hearing that the scientific evidence presented at trial was invalid. (Order at 6). The trial court ruled:

> The testimony presented by the defendant at the evidentiary hearing has failed to produce any indication that the identification of the defendant's fingerprint was wrong. The defendant's current presentation seems to argue that had trial counsel retained a fingerprint expert, trial counsel would have known that fingerprints cannot be dated. The defendant attempts to tie this issue to the trial testimony of Bruce Scott, FDLE fingerprint examiner, who ventured at trial that he believed that the defendant's fingerprint found on the victim's check in the backyard was relatively fresh (or words to that effect). That fingerprints cannot be dated was well known to trial counsel. Paraphrasing his testimony at the evidentiary hearing, trial counsel was stunned when the state's fingerprint expert volunteered that information during his testimony. Trial counsel's objection at trial and his cross-examination of Bruce Scott at trial, and his argument to the jury during the guilt phase, clearly reveal that trial counsel knew that fingerprints could not be dated. In fact, trial counsel's cross-examination

> questions eventually led the state's fingerprint expert to acknowledge that fingerprints could not actually be dated, but that there were circumstances from which one could infer when the fingerprint had been left. During the course of the trial, it was obvious to the jury that the fingerprint was fresh as it was found on a check to which the defendant had no access, in a wallet to which the defendant had no access, which had been inside the residence prior to the rape and murder of the victim, and which was found laying in the backyard by investigating officers after the discovery of the victim's body.
>
> At the evidentiary hearing (pp. 179-193, E.H. Feb. 21, 2002), trial counsel testified that he kept current with the field of forensic sciences at the time, as well as policies of local law enforcement, including the FDLE. Trial counsel knew that it was the policy of the FDLE to have a supervising examiner review any identifications made by any FDLE fingerprint examiner before positive identification was reported. Trial counsel, therefore, knew that there was a second opinion confirming the identification of the defendant's fingerprint on the victim's check. Furthermore, during the course of the evidentiary hearing, the state produced Ernest Hamm, the supervisor of the FDLE fingerprint examination section at the time, who testified that not only had he confirmed Bruce Scott's identification of the defendant's fingerprint for the trial, he had again examined the evidence and again confirmed the identification of the defendant's fingerprint just prior to the evidentiary hearing. The defendant's current presentation has failed to establish that the state's fingerprint evidence was flawed in any respect or that trial counsel's performance on his issue was in any way deficient.

(Order 9-11).

Evidentiary hearing testimony

At the evidentiary hearing, Reed presented the testimony of a former latent print examiner with the Jacksonville Sheriff's office, Ronald Fertgus. (EH Feb 19 at 190-238). He reviewed the trial testimony of the State's fingerprint expert, Bruce Scott (EH Feb 19 at 194). He testified that ninhydrin acetone is used to develop latent prints. (EH Feb 19 at 200). Fertgus disagreed with the fingerprint expert's testimony at trial based on the quick reaction, an expert could tell the length of time

that the print has been on the item. (EH Feb 19 at 200, 204). Fertgus testified that it was not possible to "date" a fingerprint. (EH Feb 19 at 205,206,238). On cross, Fertgus testified that ninhydrin can produce reactions of differing intensity. He also testified that a fresh fingerprint produces an intense ninhydrin reaction. (EH Feb 19 at 231). Moreover, he testified that you can gain some insight into the dating of the print from the surrounding circumstances. (EH Feb 19 at 235-236). For example, if an item had been recently cleaned, then a time frame could be placed on when the fingerprint was placed on the item. (EH Feb 19 at 236). Fertgus was not aware that the fingerprint was found on an item that was in the backyard and that appeared to have been strewn through the crime scene. (EH Feb 19 at 236). He agreed that a fingerprint on a check that had been outdoors exposed to weather, sun, rain, humidity and dew would deteriorate. (EH Feb 19 at 237). Ernest Hamm, who was Bruce Scott's supervisor at FDLE, also testified at the evidentiary hearing that there was "no scientific or technical way to date a fingerprint" but noted that some examiners have opinions about the freshness of a fingerprint based upon their reactivity to the agents that they are using." (EH Feb 22 at 13,14). He acknowledged that dating a fingerprint by a ninhydrin reaction was not accepted in the fingerprint scientific community. (EH Feb 22 14).

APD Chipperfield testified at the evidentiary hearing, that Bruce Scott's testimony that he could tell that the print was fresh from the reaction was "bologna". (EH Feb 21 at 86).

However, APD Chipperfield testified, that while you cannot date a fingerprint, you could put time limits on a fingerprint by where that object containing the print had been. (EH Feb 21 at 85). He explained that if the object was outdoors in the rain then it "must be pretty fresh". (EH Feb 21 at 86). The "circumstances could tell you whether the print was fresh or not" but the print itself could not. (EH Feb 21 at 86). While APD Chipperfield testified that he made motion to have mental health, hair and blood experts appointed, he did not have a record of having made a motion to appoint a fingerprint expert. (EH Feb 21 at 97).

Reed rested his case without calling trial counsel to the stand. (EH Feb. 21 at 178). However, the State presented Mr. Nichols, Reed's trial counsel, as their witness. (EH Feb. 21 at 179,187-188). He maintained a working familiarity with forensic sciences including fingerprint expert testimony. (EH Feb. 21 at 184-185). He knew that FDLE's policy was to have a second independent examiner confirm any fingerprint identification. (EH Feb. 21 at 189). His strategy for dealing with the fingerprint was to minimize it by showing that Reed had been living in the victim's house and that the fingerprint may have been left during this period rather than during the crime. (EH Feb. 21 at 189-190). There was nothing about the expert's testimony that lead him to think that he needed an expert of his own. (EH Feb. 21 at 191). He decides to consult his own expert if the State's scientific testimony is damaging and it is not well established, widely accepted science. (EH Feb. 21 at 193). He testified that

it was his impression that a fingerprint could not be dated and that there was no way to tell with any certainty whether a fingerprint was left minutes, days or a decade before. (EH Feb. 21 at 186-187). He thought his cross-examination of Bruce Scott regarding Scott's testimony about the freshness of the fingerprint was successful and that by the end of closing the jury knew that Scott's testimony was "preposterous". (EH Feb. 21 at 191).

Merits

Bruce Scott testified repeatedly at trial both on direct and on cross that it was not possible to date a fingerprint. (Trial at 687,706,707). Furthermore, any testimony regarding "dating" the fingerprint was not prejudicial. The circumstances of the crime date the fingerprint on the check. Reed's defense that his fingerprints can be accounted for because he lived in the house is unavailing. Reed's fingerprint was NOT located inside the house on some common household item. Rather, Reed's fingerprint was found on an item taken during the crime. The perpetrator took the checks and the victim's wallet during the robbery. The checks were discarded outside in the backyard and the victim's wallet was discarded in the canal on the path the perpetrator took as leaving the house. That path led back to the defendant's trailer park. Obviously, the victim did not store her bank documents and checks in the backyard. Moreover, the Reverend testified at trial that there were no checks in the

backyard at 4:00 pm when he walked around in the backyard on the day of the murder. Reed's fingerprint was located on an item that he did not have access to during his stay at the Reverend's house and that was moved during the crime. The jury, based on the evidence, concluded that the fingerprint was left during the crime, not merely within the last 10 days. The nature and circumstances of the item "date" the fingerprints regardless of the expert's testimony.

Trial counsel handled the expert's testimony appropriately. He cross-examined him, getting him to admit that it was not actually possible to date a fingerprint. Furthermore, there was no prejudice because the circumstances surrounding the check dated the check to the time of the crime, not merely the 10 days that the expert testified as being possible. *Sorey v. State*, 419 So.2d 810 (Fla. 3d DCA 1982)(finding evidence of a fingerprint, standing alone sufficient to sustain a conviction where the fingerprints were found in the non-public part of the restaurant and rejecting hypothesis of innocence that prints were made at a time other than the time of the crime because of the circumstances). Hence, counsel was not ineffective.

ISSUE V

DID THE TRIAL COURT ERR IN FINDING NO INEFFECTIVENESS FOR FAILING TO PRESENT AN ALIBI DEFENSE? (Restated)

Reed next asserts that his counsel was ineffective for failing to present an alibi defense based on Mark Rainey's testimony. The State respectfully disagrees. Trial counsel is not

ineffective foro declining to present an alibi defense that does not exist. Reed did not have an alibi. Thus, the trial court properly denied this ineffectiveness claim following the evidentiary hearing.

The trial court's ruling

The trial court ruled:

> In support of this claim, the defendant called three (3) witnesses at the evidentiary hearing. Mark Rainey, an acquaintance and neighbor of the defendant, who testified at the trial; Christine Niznik, the defendant's significant other, who was living at Ware's Trailer Park with the defendant (and who apparently refused to testify at the trial); and David Summersill, Jacksonville Sheriff's Office, who had contact with the defendant at approximately 4:00 P.M., on the afternoon of the murder. Officer Summersill also testified to assorted computer logs which the defendant offered during the course of the evidentiary hearing. Officer Summersill did not testify at the trial.
>
> Considering the evidence at trial and the testimony during the evidentiary hearing, this Court concludes that the defendant has failed to establish any deficient performance on the part of trial counsel as to this issue. In considering this particular claim, one must remember that trial counsel had deduced that the defendant had actually admitted the crimes to trial counsel. One must also remember that the defendant had intimated to trial counsel that the search for alibi witnesses would be fruitless.
>
> At the trial, the state presented two (2) witnesses, Debra Hipp and Lisa Ann Smith, who testified that they saw the defendant running into the trailer part at approximately 7:30 or 8:00 on the evening of the murder. Based on the testimony of the victim's husband, the state's theory was that the victim was raped and murdered sometime between 5:40 P.M. and 9:50 P.M., on February 27, 1986. These were the times when Rev. Oermann departed for his meeting and returned to find his wife's body. Mark Rainey's testimony at both the trial and the evidentiary hearing was less than conclusive as to the time when he saw the defendant at the trailer part on the evening of the murder. Perhaps more importantly to the state, Mark Rainey was the witness who positively identified the soft drink baseball cap found at the scene as being that of the defendant.
>
> According to Officer Summersill, he met the defendant at approximately 4:00 P.M. on the afternoon of the murder. The defendant was in the back of a car on Ricker Road and

was somewhat intoxicated. The police report makes no reference to the defendant's being ni possession of a baseball cap, nor did Officer Summersill have any such recollection. Officer Summersill did not arrest the defendant, but, instead, merely prepared a "contact report" which was filed with the Jacksonville Sheriff's Office.

With regard to this report, this Court cannot find that it is in anyway a basis for the defendant's current claim against trial counsel. Part of the trial evidence indicated that the defendant had borrowed a car which had broken down on Ricker Road on the afternoon of the murder. The report at best confirms this and places the defendant on a major thoroughfare not far from the scene of the murder and his own trailer park. The victim's residence was less than a mile from that of the defendant.

More importantly, trial use of the report would have done nothing more than to damage the defendant as its contents certainly would have been used by the state to impeach the defendant's statement given to the police. In his interview with the assigned homicide detective, the defendant related that he had been at his trailer park throughout the *entire* day of the homicide (II. 6-14, p. 547, TT). That he had contact with Officer Summersill at 4:00 p.m. that afternoon is utterly inconsistent with his statement.

Accordingly, with regard to Officer Summersill's contact with the defendant, this Court concludes that it, in no way, supports a finding of deficiency no the part of trial counsel. Furthermore, even had counsel known of the existence of the report, it would have made no difference to the outcome of the trial. Its use might actually have been to the detriment of the defendant.

Through Officer Summersill the defendant also offered computer printouts of calls made from Ware's Trailer Park on the late afternoon and evening of the murder. Though not a custodian of such records, Officer Summersill was familiar with their nature and was allowed to testify from them. Presumably they were offered to establish a time frame for calls which the trial testimony showed may have been made to the Jacksonville Sheriff's Office on the day of the murder. The defendant's suggestion is that a fight between the defendant and another person (possibly Christine Niznik) was boisterous enough for the police to be called. However, the logs introduced at the hearing fail to support this suggestion. As an aside, this Court is well aware, and the testimony at the evidentiary hearing supoprts this observation, that Ware's Trailer Park in 1986 and 1987 was a well-known problem area which gave rise to many calls to, and visits by, the Jacksonville Sheriff's Office not to mention frequent arrests. The testimony offered regarding the logs in no way supported the defendant's suggestion that he had an alibi. Furthermore, that testimony offered by the

defendant regarding the computer logs turned out to be essentially irrelevant and more than likely would not have been permitted as evidence at the trial.

During the course of his testimony, Assistant Public Defender, Allen Chipperfield, initially appointed to represent the defendant, related that he had attempted to obtain transcripts of the dispatch tapes pertaining to the calls documented in the computer printouts. He learned that the tapes had already been reused and that their previous contents were, therefore, unavailable for anyone. Mr. Chipperfield also testified that it was his custom at the time to provide newly appointed counsel with his entire file, including any progress notes and synopses of his investigation. This Court concludes that the information regarding the non-existence of the dispatch tapes was likely transmitted to trial counsel. Accordingly, this Court cannot conclude that there is any deficient performance on the part of trial counsel for failing to obtain evidence which did not exist. Lastly, this Court observes that even had the logs and tapes been found by trial counsel, their existence would not have changed the outcome of the trial. Even in the light most favorable to the defendant, the computer printouts introduced indicate that the only possibly pertinent call was made from Ware's Trailer Park at approximately 9:15 P.M. on the evening of the murder. According to the trial testimony of either Lisa Ann Smith or Debra Hipp, the defendant was seen returning to the trailer park between 7:30 and 8:00 P.M. on the evening of the murder.

This Court concludes that trial counsel made both a tactical decision and an ethical decision not to attempt to establish an alibi defense. Trial counsel's ethical decision not to assert an alibi defense was based on his conclusion that the defendant had acknowledged his commission of the crimes to trial counsel and that calling witnesses to establish an alibi defense was likely subornation of perjury (1.20, p. 205 through 1.12, p. 207, E.H. February 21, 2002). This Court can find no deficiency on the part of trial counsel for respecting his ethical obligations as an attorney.

In sum, with regard to the issue of the defendant's purported alibi, this Court can find nothing appropriate, much less deficient, in the performance of trial counsel. In fact, it appears obvious to this Court that trial counsel appropriately complied with his oath of professional responsibility.

Finally, at least with regard to this particular issue, this Court notes that the defendant's presentation at the evidentiary hearing fails to establish that the defendant did, in fact, have an alibi which would have altered the outcome of the trial. Given the times and locations when defendant was observed, the time when the victim's husband left his residence and returned, and the distance (less than a mile) from Ware's Trailer Park to the victim's

residence, the defendant still had the opportunity to commit the crimes for which he stands convicted.

(Order at 12-17).

Waiver

Reed signed a wavier form which contained the statement:

9. Although my attorney and I have discussed calling certain witnesses I believe that no witness could establish and alibi for me and no witness could contribute evidence which was not available either through my own testimony, if I testify, or through the states own witnesses.

(Order at 22). Reed may not sign a statement saying that he has no alibi at trial and then raise an ineffectiveness claim against trial counsel for failing to present an alibi defense. Basically, Reed is accusing his trial counsel of ineffectiveness for believing him when he told his trial attorney and the judge that he had no alibi. Reed's own waiver conclusively rebuts this claim of ineffectiveness.

Evidentiary hearing testimony

Mark Rainey testified at the evidentiary hearing. (EH Feb 19 at 83-107). Mark Rainey, who was a friend of Reed's and who testified at the trial, did not recall the events on the day of the murder well. (EH Feb 19 at 85,105). Mark was at the Ware's Trailer Park[7] visiting the Hipps the evening of the murder. (EH Feb 19 at 85). Reed had borrowed the Hipp's car which had

[7] This is the trailer park where Reed lived.

broken down on Ricker Road. (EH Feb 19 at 86,97,99). Mark and Patrick Hipp went to retrieve the car. (EH Feb 19 at 86). Reed was not there. (EH Feb 19 at 85). After attempting to fix the car, they towed it back to the trailer park because it was getting too dark to see what they were doing. (EH Feb 19 at 85,98-99). They tied Hipp's car to Rainey's car with a rope and went by way of back roads so it took some time. (EH Feb 19 at 99-100). Ricker Road was a few miles from the trailer park. (EH Feb 19 at 99). Mark testified that about 15 or 30 minutes after returning to the trailer park he saw Reed fighting with Mr. Lee. (EH Feb 19 at 85,101). The police were not called because of this fight. (EH Feb 19 at 104). Mark Rainey could not testify as to the time because he was not wearing a watch and he is not "good at estimating time", only that it was dark. (EH Feb 19 at 85-86,96). Post-conviction counsel attempted to refresh the witness's memory with his June 1986 deposition. (EH Feb 19 at 87-89). In the deposition, Mark Rainey stated that he saw Reed at around 5:00 but he was not positive. (EH Feb 19 at 89). Mark Rainey again explained that he was not good with time. (EH Feb 19 at 89). He did not know why he would have said 5:00 but he pointed out that he had said in the deposition that he was not sure about the time. (EH Feb 19 at 90). He repeatedly testified that he was not sure about the time he saw Reed that night either at the time, or now, only that it was dark. (EH 91, 92). Post-conviction counsel again read his prior deposition where he stated that it was "just getting dark" when he saw Reed the night of the murder. (EH Feb 19 at 93). Mark

Rainey testified that he did not know why he would have said that. (EH Feb 19 at 94). On cross, Mark Rainey testified that he did not have a detailed memory at the time of the deposition. (EH Feb 19 at 95).

Chris Niznik, who was Grover's girlfriend and was living with Grover in the trailer park at the time of the crime, testified at the evidentiary hearing. (EH Feb. 21 at 133). She and Grover have a child together (EH Feb. 21 at 133, 147-148). She and Grover had lived with the Oermanns. (EH Feb. 21 at 134). They were not kicked out of the house by the Oermanns. (EH Feb. 21 at 134). On the day of the murder, Grover borrowed Deborah Hipp's car to get some beer at lunch time around 1:00 (EH Feb. 21 at 135,136). Grover left the trailer park with the car but she remained at the trailer park. (EH Feb. 21 at 137). Grover was gone for "hours." (EH Feb. 21 at 138). She was mad at Reed for being gone as long. She testified that Lisa called the police when it was still light outside, "probably might have been" 4:00 or 5:00 p.m. but the police refused to respond. (EH Feb. 21 at 139). She testified that Grover returned just after it got dark but she did not know what time that was. (EH Feb. 21 at 139,163). She testified that from the time Grover returned just after dark, Grover was with her the entire time. (EH Feb. 21 at 140,155). She testified that she never talked with the lawyers about this "alibi", she just gave a deposition but the lawyers never contacted her and it was not her job to contact them (EH Feb. 21 at 140-141).

Assistant Public Defender Alan Chipperfield, who originally handled this case until a conflict of interest arose, testified at the evidentiary hearing. (EH Feb. 21 at 49,61). He took several depositions in the case including Mark Rainey's. (EH Feb. 21 at 50). Mark Rainey was the person who gave Reed the Dr. Pepper cap. Chipperfield had been exploring presenting an alibi defense. (EH Feb. 21 at 50,54,71). He could not recall how fruitful the alibi defense was proving to be. (EH Feb. 21 at 55). APD Chipperfield thought, based on his notes taken contemporaneously with the deposition, that Mark Rainey's statement about returning at 5:00 "might be helpful" (EH Feb. 21 at 56,58). APD Chipperfield had gone to the trailer park and the victim's home in an attempt to figure out distances and times. (EH Feb. 21 at 59). APD Chipperfield filed a notice of alibi defense on July 24, 1986 listing Mark Rainey as the alibi witness. (EH Feb. 21 at 62). APD Chipperfield testified that, while he could not actually remember giving a synopsis to Mr. Nichols, it was his normal practice to give a written summary of the case to successor counsel. (EH Feb. 21 at 66). He makes sure that his files on the case are available to successor counsel and he is available to discuss the case with any successor counsel but he could actually remember discussing this particular case with Mr. Nichols. (EH Feb. 21 at 66).

Mr. Nichols, Reed's trial counsel, testified that he considered an alibi defense early in the case. (EH Feb. 21 at 203). However, even in its best light, the alibi defense was an incomplete alibi defense because even if the witnesses testified

as to Reed's whereabouts, it still left enough time for Reed to commit the crime. (EH Feb. 21 at 203). Reed admitted to counsel, in response to counsel's statement that he did not want to waste his time looking for alibi witnesses if there were no true alibi witnesses, that it would be a waste of time. (EH Feb. 21 at 204). Moreover, trial counsel explained that weak, incomplete, partial alibi defenses are worse than no defense. (EH Feb. 21 at 207). According to trial counsel, an alibi defense has to "kill" the State's case completely.

Merits

Counsel is not ineffective for failing to present an alibi defense that does not exist. Counsel is not ineffective for not being able to pull a rabbit out of his hat or manufacture a defense. *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir.1995)(noting that "lawyers are not miracle workers" and that "most convictions follow ineluctably from the defendants' illegal deeds"). Mark Rainey could not establish even a partial alibi. The victim was raped and killed between 5:40 and 9:50 p.m. The sun set at 6:24 on February 27, 1986. (EH Feb. 21 at 54)[8]. It is 1.2 miles from the victim's home to Reed's trailer. (T. 570). Even the narrowest interpretation of Mark Rainey's testimony, with Mark seeing Reed back at the trailer park at between 6:39 and 6:54 p.m., gives the defendant one hour to rape and kill the victim and run one mile. Mark Rainey's testimony simply is not the basis for an alibi.

[8] The trial court also took judicial notice of this fact at the evidentiary hearing.

Furthermore, Mark Rainey was unsure of the time. The State presented several witnesses at trial, Debra Hipp and Lisa Ann Smith, who saw defendant running back to the trailer park at 7:30 or 8:00. (Trial 501, 506-511). They were much more certain of the time because they were watching the clock waiting for the defendant to return with the Hipp's car and were upset with him for not being back on time. Counsel is not ineffective for not presenting a quasi-alibi defense involving a witness who was uncertain about the time that the State can easily rebut with multiple witnesses who were more certain of the time. *Frank v. State*, 376 N.W.2d 637, 641 (Iowa Ct. App. 1985)(concluding that counsel is not ineffective for failing to present alibi testimony where the alibi testimony was weak and vague).

Additionally, courts do not find ineffective assistance of counsel for failing to present the testimony of a witness that, in fact, testified at trial. Mark Rainey testified at the original trial. Normally, claims of ineffective assistance of counsel for failing to present an alibi defense involve a witness who did not testify at the original trial but who then testifies at the evidentiary hearing that he would have testified and given the defendant an alibi if only the attorney would have contacted him. *Glover v. Miro*, 262 F.3d 268, 274 (4th Cir. 2001)(holding, in a case where the attorney failed to contact the alibi witnesses that the defendant gave him the names of, that the defendant failed to establish a valid alibi defense at his post-conviction hearing and thus failed to show prejudice under *Strickland*). By definition, there can be no

prejudice when the witness testified at the original trial. To be believed, one would have to believe that Mark Rainey knew that the defendant was somewhere else at the time of the murder and failed to mention it at the original trial. Such a premise is simply incredible. Furthermore Mark Rainey again testified at the evidentiary hearing and explicitly testified that he could not provide an alibi for Grover Reed. Reed cannot establish either deficient performance or prejudice under this set of facts.

Regarding Chris Niznik, she also does not provide Grover with even a partial alibi. As the trial court found, her testimony was "less than credible." (Order at 13). She chose not to testify at the original trial. Her excuse for not testifying, although aware that Grover was on trial for murder and she thought she could establish an alibi, was that it is not her "job". As the trial court found her testimony was "evasive and conflicting" (Order at 13). She testified that the lawyer never talked with her but in the same sentence admitted giving a deposition. She does not account for the fact she did not provide the alibi in her deposition. She testified that no one ever contacted her but admits speaking to defense counsel Nichols on the telephone. She says that she would have come back to testify if she was needed but fails to explain how she could possibly think that if she was the person with Grover that night she would not be needed to establish this alibi.[9] APD

[9] She also testified that she never saw Reed with a Dr. Pepper cap. (EH Feb. 21 at 148-149,151). However, she was impeached with her July 24, 1986 sworn statement, in which she

Chipperfield did not refer to her as part of the possible alibi defense and he did not list her in his notice of alibi. She did not tell APD Chipperfield this alibi either. Furthermore, the content of her testimony is also incredible. She testified that Lisa called the police at 4:00 or 5:00 p.m. and that the police refused to respond yet it is obvious from the police logs that Lisa's call occurred after 9:00 p.m. and the police responded in person and promptly. She is 4 or 5 hours off on the timing of Lisa's call. She is also mistaken on the police's response. Additionally, she did not testify as to an exact time that Grover returned to the trailer park - only that it was just after dark. This is not an alibi because Grover still could have committed this crime and returned just after dark. When the prosecutor pointed out that Deborah Hipp was watching the clock because she needed to be somewhere and was waiting for Reed to return with her car and so, Deborah Hipp would have been in a better position to note the exact time Reed returned, her response was "no comment".

Reed simply had no alibi and counsel is not ineffective for recognizing this fact. Based on Reed's statements to trial counsel admitting involvement, counsel reasonably did not attempt to investigate or locate non-existent alibi witnesses. *Gudinas v. State*, 816 So.2d 1095, 1102 (Fla. 2002)(finding no

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stated that she identified the red and white Dr. Pepper cap as Reed's. (EH Feb. 21 at 151-152). She was also impeached with her April 4, 1986 sworn statement in which she admitted that Reed owned a Dr. Pepper cap. (EH Feb. 21 at 152-153). She then stated that she could not remember and just wanted this over and then "never mind" (EH Feb. 21 at 153-154).

ineffectiveness for failing to further investigate the DNA in light of Gudinas's incriminating statements about the crime to his attorneys). Thus, the trial court properly denied this claim.

ISSUE VI

DID THE TRIAL COURT PROPERLY DENY THE *BRADY* CLAIM FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Reed asserts that the State's fingerprint expert, Bruce Scott, was under investigation for drug use by both an internal FDLE investigation and the State Attorney's office and had resigned from FDLE at the time of his trial testimony and that the State's failure to inform the defense of this information was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The State respectfully disagrees. The investigation was not *Brady* material. None of this evidence would have been admissible at trial. Furthermore, the State merely would have substituted another fingerprint expert for Bruce Scott. Thus, the trial court properly denied the *Brady* claim following an evidentiary hearing.

The trial court's ruling

The trial court rejected this claim of ineffectiveness:

> The defendant contends that the state violated the tenets of Brady v. Maryland, 373 US 83, 83 S.Ct. 1194, 10 LED 2d 215 (1963). According to the defendant, this violation occurred when the state failed to disclose that Florida Department of Law Enforcement (FDLE) fingerprint examiner had been suspended, then resigned, from the FDLE for use of cocaine.
>
> A summary of the testimony at the evidentiary hearing is as follows: On or about April 7, 1986, fingerprint examiner Scott compared the defendant's known fingerprint to the latent print found on the victim's check found in her backyard on the evening of her death. Scott

positively identified the fingerprint on the check as being that of the defendant. He prepared a written report. Because of a policy in effect at the time within the laboratory, Scott's supervisor and fellow fingerprint examiner, Ernest Hammn, did an independent comparison of the items and confirmed Scott's positive identification of the defendant. Scott and Hamm worked closely both on a professional level and a physical level as they shared the same laboratory. Scott's trial testimony in November 1986, identifying the defendant led to the defendant's earlier claim regarding trial counsel's failure to retain an individual fingerprint examiner.

Steve Platt, chief of the Jacksonville FDLE crime lab in 1986 (now senior crime laboratory analyst) testified that sometime in the month of June 1986, Bruce Scott came to him and reported that over some time Scott had been collecting cocaine residue from exhibits which he had analyzed. Scott further reported to Platt that he had, on occasion, tasted and sniffed the collected residue. Platt believed that Scott may have been under the influence of something at the time of this conversation. Scott was immediately suspended.

Thereafter, representatives of the supervisory section of the FDLE conducted additional interviews with Scott. Those interviews developed no further evidence against Scott. As part of the investigation, all of Scott's cases for the preceding eighteen (18) months were reviewed and no deficiences were noted. During the course of this internal investigation, Scott resigned sometime in June 1986.

The results of the internal investigation were referred to then Assistant State Attorney, now Assistant United States Attorney, for consideration. Because the only evidence against Scott was his own report of his shortcomings to his supervisors, and because there was virtually no other evidence against Scott, Kunz declined prosecution. While Kunz probably discussed the matter with his superiors, he had no recollection of discussing the matter with the trial prosecutor, Assistant State Attorney George Bateh.

Assistant State Attorney Bateh testified at the evidentiary hearing that no one had ever told him about any shortcomings on the part of Bruce Scott. According to his recollection, he first heard of Scott's resignation either by way of the defendant's 3.850 motion or the defendant's public records request. Bateh further testified that had he known of the reason for Scott's resignation, he likely would have notified defense counsel, but would have simply used fingerprint examiner Hamm as his trial witness instead of Scott. As mentioned earlier in this order, trial counsel testified that at the time he was aware of FDLE's policy requiring supervisor's confirmation of any examiner's fingerprint identification.

It is, perhaps, too obvious to mention, but it seems apparent that Scott was not visibly under the influence of any substances at the trial as the trial court allowed him to testify and as his testimony comprises some forty (40) pages of trial transcript.

Upon the foregoing, this Court concludes that there as been on *Brady* violation as none of the evidence regarding examiner Scott would have been admissible. There has been no showing by the defendant that Scott was under the influence of anything at the time of his examination, in fact, the subsequent internal investigation found no deficiencies in any of his cases for eighteen (18) months preceding his resignation, and, as noted previously, there has been no evidence indicating that Scott's trial testimony was in any way tainted. Scott was never arrested, never prosecuted, and (to be technical) was never terminated by FDLE for his actions. Furthermore, his closest associate, examiner Ernest Hamm, never saw Scott in any condition which he believed was Scott was under the influence of anything, never suspected any wrongdoing on the part of Scott, and to this day, remains confident that Bruce Scott was a competent qualified fingerprint examiner. Even were Scott to have been arrested, prosecuted, and imprisoned, none of this would have in any way affected the outcome of the defendant's trial. Fingerprint examiner Hamm was available to the state and would have testified to the positive identification of the defendant's fingerprints found at the scene of the murder.

This Court finds support for this conclusion in at least (2) cases referred to by the state. In Breedlove v. State, 580 So.2d 605 (Fla. 1991), in a Rule 3.850 appeal, the Florida Supreme Court found that the state's failure to reveal criminal conduct on the part of an investigating officer was not, under the circumstances, a *Brady* violation as to the officer's criminal conduct was not relevant to the evidence at trial. Among Mr. Breedlove's assorted appeals, one will also find Breedlove v. Moore, 2002 WL 63184 (11th Cir. 2002) wherein the 11th Circuit agreed that inadmissible evidence is not material for *Brady* purposes unless it would also lead to the discovery of admissible evidence. During the course of the evidentiary hearing, nothing was developed by the defendant which would even remotely suggest that there was other admissible evidence, nor, and more importantly, that there was anything inappropriate, wrong, incorrect, or fundamentally detrimental to the defendant with regard to the identification of his fingerprint at trial. Accordingly, this Court concludes that the defendant has failed to support this particular claim.

(Order at 31-34).

The evidentiary hearing testimony

Bruce Scott produced a report on April 7th, 1986 identifying the fingerprint on the check located in the victim's backyard as Reed's. (EH Feb. 20th at 80). At trial, Bruce Scott testified on November 19, 1986 that the fingerprint on the check was Reed's right thumb fingerprint. (Trial at 695). Scott did not testify at the evidentiary hearing.

At the evidentiary hearing, Steve Platt, a FDLE senior crime analyst, who was Bruce Scott's supervisor at FDLE in 1986, testified that in June of 1986 Bruce Scott confessed to him that he had been using cocaine at work. (EH Feb 20th at 49-50,52,58,60). He also testified that based on his personal observations of Bruce Scott, he thought that Bruce Scott was under the influence. (EH Feb 20th at 51). Steve Platt informed his superiors at FDLE and that FDLE conducted an internal investigation. (EH Feb 20th at 50,55). Steve Platt suspended Scott from case work as of June 4, 1986. (EH Feb 20th at 55). Bruce Scott resigned in June of 1986 during the course of the internal investigation. (EH Feb 20th at 55,67-68). FDLE reviewed all of Bruce Scott's work for a 18 month period, back to January of 1985 in light of this information. (EH Feb 20th at 54). None of Scott's cases in that 18 month period needed to be redone or corrected (EH Feb 20th 94). FDLE sent the State Attorney's Office the internal investigation report and then Assistant State Attorney Steven Kunz was informed. (EH Feb. 20th at 56). As a matter of routine practice, as subpoenas for Bruce Scott were received, FDLE would inform the State's Attorney's office that Scott had resigned during an investigation into his removal

of cocaine in the lab. (EH Feb. 20th at 69). Bruce Scott was never arrested nor prosecuted for his drug use. (EH Feb. 20th at 80). Mr. Platt testified that Bruce Scott was an "outstanding" latent print examiner who was well respected by his peers. (EH Feb 20th at 88).

The prosecutor who handled Bruce Scott's case, Steven Kunz, testified at the evidentiary hearing. (EH Feb 20th at 100). Reed introduced a letter from the State Attorney's office from ASA Kunz to FDLE. (EH Feb 20th at 99,101). The letter was written on August 28, 1986. (EH feb 20th at 105). The letter reflects that the State Attorney's office declined to prosecute Bruce Scott because there was no corpus delicti as needed to admit the confession. (EH Feb. 20th at 102,104,111).[10] Because there was no physical evidence to corroborate the confession, any prosecution would have been dismissed. (EH Feb 20th at 103,110,112-113). Mr. Kunz did not discuss Bruce Scott's case with Mr. Bateh, Reed's prosecutor. (EH Feb 20th at 106,107,113). Because the State Attorney file regarding Bruce Scott no longer exists, now

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[10] Florida law requires that the corpus delicti be established independently of any confession before the confession is admitted into evidence. *Franqui v. State*, 699 So.2d 1312, 1317 (Fla.1997). *Schwab v. State*, 636 So.2d 3 (Fla.1994); *Burks v. State*, 613 So.2d 441 (Fla.1993); *State v. Allen*, 335 So.2d 823, 824 (Fla.1976). In a drug prosecution case, this doctrine means that the State will need the drug itself. *State v. Wallace*, 734 So.2d 1126, 1129 (Fla. 3d DCA Dist. 1999)(stating that the presence of the contraband in the closet established that a crime had been committed and that someone was criminally liable). In Bruce Scott's case, there were no drugs, only the confession

Assistant United States Attorney Kunz, could not remember with whom he discussed the case. (EH Feb 20th at 106).

Phillip Thompson, who is a inspector with FDLE, testified at the evidentiary hearing regarding the investigation into Bruce Scott's cocaine use. (EH Feb 20th 137-193). He had been informed by Steve Platt of Scott's possible cocaine use (EH Feb 20th at 144). He conducted a taped interview with Bruce Scott on June 6th, 1986. (EH Feb 20th at 145-146). Bruce Scott stated that his curiosity got the better of him in November of 1985 and he had tasted the cocaine he had tested. (EH Feb 20th at 147,161). Bruce Scott admitted to tasting cocaine 9 or 10 times and to inhaling cocaine on two or three occasions. (EH Feb 20th at 149). Bruce Scott told him that the only affect it had was that he got a bitter taste in his mouth and made his nose numb. (EH Feb 20th at 176). He testified that Bruce Scott would collect the residue from several baggies over a period of time to get enough to be able to use. (EH Feb 20th at 190). Later Bruce Scott claimed his exposure was accidental. (EH Feb 20th at 153). Bruce Scott was given a polygraph on June 17th, 1986. (EH Feb 20th at 154). He reported his findings to Greg Marr. (EH Feb 20th at 168). Greg Marr conducted the remainder of the internal investigation. (EH Feb 20th at 154). He also testified that Bruce Scott was held in "good standing". (EH Feb 20th at 177). Ernest Hamm, who was Bruce Scott's supervisor at FDLE. who worked side-by-side with him in a very small lab, also testified that Bruce Scott was an "excellent examiner", who was

dedicated, hard working, “very much up on innovative techniques” with an excellent work record . (EH Feb 22 at 10).

George Bateh, who was the prosecutor in this case, testified at the evidentiary hearing that he did not recall seeing Officer Summersill’s report or speaking with Officer Summersill before trial. (EH Feb. 21 at 169). He did not find out about the defendant’s encounter with Officer Summersill until years after the trial. (EH Feb. 21 at 174). Field investigative reports are not routinely supplied to the State Attorney’s Office with the homicide package. (EH Feb. 21 at 173-174). Mr. Bateh first learned that Bruce Scott had resigned from FDLE under investigation for drug use by reading Reed’s post-conviction motion. (EH Feb. 21 at 172). He “didn’t know anything about Bruce Scott’s problems at the time of trial” and Bruce Scott did not mention it to him during the course of his preparation for trial. (EH Feb. 21 at 173,174-175).

Merits

This evidence is not material under *Brady* because it is not admissible. In *Breedlove v. State*, 580 So.2d 605, 607-09 (Fla.1991), the Florida Supreme Court held that the criminal activities of the investigating detectives which included cocaine use was not admissible and therefore did not constitute *Brady* material. The two investigating detectives were involved in numerous crimes including the use of cocaine at the station at the time of Breedlove’s case. An FBI investigation ended in

federal RICO charges against one detective and there was an internal investigation of the other detective. Breedlove argued that evidence of the detectives' criminal activities could have been used to show their bias in testifying for the prosecution in order to gain more favorable treatment if and when the state proceeded against them. The Court held that because the detectives' criminal conduct was completely unrelated to the charges against Breedlove, and because the detectives had not been indicted or convicted of any crime at the time of Breedlove's trial, the detective's criminal activities would have been inadmissible at Breedlove's trial. The Eleventh Circuit agreed that because such testimony is not admissible, it is not a *Brady* violation to fail to disclose it. *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002)(explaining that inadmissible evidence is not material for *Brady* purposes unless it would lead to admissible evidence citing *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995); *See also Gorby v. State*, 819 So.2d 664 (Fla. 2002)(finding no *Brady* violation where the State's medical examiner, in a capital case, was a suspect in his wife's murder but had not been arrested at the time of trial but was later convicted of the murder because such a claim requires improper layers of inference to support the claim of bias and because there was no evidence presented during post-conviction proceeding that materially contradicted the medical examiner's trial testimony); *Sanchez-Velasco v. Moore*, 287 F.3d 1015, 1031-1032 (11th Cir. 2002)(finding no evidence of bias due to the expert's subsequent arrest for possession of cocaine

which was unrelated to the disputed issue and because the arrest had not occurred at the time of his report and testimony, evidence of it would be inadmissible); *Forte v. State*, 662 So.2d 432 (Fla. 3d DCA 1995)(finding no abuse of discretion in the trial court refusing to admit evidence of an internal affairs investigation during cross-examination of police officers because it was not relevant).

Here, as in *Breedlove*, Bruce Scott's drug use was not relevant and would have been inadmissible and therefore, it is not a violation of *Brady* to fail to disclose it. The fingerprint expert's drug use did not relate to this prosecution for rape and murder. Nor did the drug use affect the fingerprint results in this case. While there was evidence of drug use, the evidence was that it only occurred two or three times and it involved extremely small amounts. There was no evidence that such small amounts of cocaine would be sufficient to render Scott intoxicated on cocaine. Ernest Hamm, who was Bruce Scott's supervisor at FDLE, who worked side-by-side with him in a very small lab, also testified that Bruce Scott never observed him intoxicated during working hours. (EH Feb 22 at 10,11). There is no connection between any misconduct on the part of the fingerprint examiner and Reed's guilt. Such testimony would have been excluded as irrelevant and collateral. Additionally, here, as in *Breedlove* and *Gorby*, Bruce Scott was not charged or convicted of any crime at the time of trial. Indeed, unlike *Breedlove* or the medical examiner in *Gorby,* Scott was never arrested or prosecuted. Moreover, here, as in *Sanchez-Velasco,*

the expert was not being investigated at the time he made the report. Bruce Scott identified the fingerprint as Reed's in April of 1986. Scott did not confess until June of 1986, which was two months later. (EH Feb 20th at 82). Furthermore, the State Attorney's Office had decided three months prior to Bruce Scott's trial testimony, in August of 1986, that it could not prosecute the case because the only evidence was not admissible.

Additionally, to establish a *Brady* violation, a defendant must establish that the verdict is not worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)(explaining that the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence); *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) (holding that *Brady's* materiality standard reflects our overriding concern with the justice of the finding of guilt). In the case of a fingerprint expert, the defendant must establish that the fingerprint identification was faulty. Reed has not even attempted to establish that the fingerprint on the check, an item moved during the murder, is not his fingerprint. FDLE had a policy, since 1975, of independent verification. (EH Feb 20th at 82,180). Bruce Scott's identification of the fingerprint as Reed's was confirmed by a second qualified examiner, Ernest Hamm. (EH Feb. 20th at 83). The State presented at the evidentiary hearing, a second expert, Ernest Hamm, who was Bruce Scott's supervisor at FDLE. (EH Feb

22 at 4, 7). He had independently examined the fingerprint in 1986 to confirm that the fingerprint on the check was Reed's fingerprint. (EH Feb 22 at 8). Mr. Hamm reviewed the file a few weeks prior to the evidentiary hearing in 2002 comparing the fingerprint on the check with Reed's known inked fingerprints and reconfirmed that the fingerprint was Reed's. (EH Feb 22 at 8-9,12). Thus, the fingerprint evidence confirms that the fingerprint was, in fact, Reed's fingerprint.

There is no reasonable probability that the result of the proceeding would have been different as required by *Brady* because the fingerprint is definitely Reed's which is the critical issue. Scott's drug use does not put the whole case in a different light or undermine the confidence in the verdict.

The verdict of guilt, based on Reed's fingerprint, is worthy of confidence.

Reed's reliance on *Taylor v. State*, 662 So.2d 1031 (Fla. 1st DCA 1995), is misplaced. The First District merely held that an allegation of falsification of police reports leading to the resignation of a police officer should not be summarily denied. Indeed, the *Taylor* Court stated: "[w]e do not intend to suggest any opinion regarding the outcome of the matter." The First District noted that at the evidentiary hearing, Taylor would have to present sufficient evidence to support the claim that the arresting officer had falsified the accounts of events leading to other arrests so that, if presented with such evidence, a reasonable person would be likely to conclude that the same was true in his case. Only if he satisfies this

burden, will Taylor be entitled to withdraw his plea. The *Taylor* Court remanded the case for an evidentiary hearing.

Here, the trial court did not summarily this claim; rather, the trial court denied the claim after a full evidentiary hearing on the matter. Moreover, the *Taylor* court noted the possible link between the allegations and Taylor's case. Here, unlike *Taylor*, the fingerprint expert's drug use did not affect his identification of the fingerprint as the State proved at the evidentiary hearing. There was no link.

To the extent Reed is claiming ineffectiveness based on these facts, defense counsel was not ineffective for failing to discover the fingerprint expert's drug use and attempt to impeach witness with this evidence because it is not admissible. Furthermore, even if the trial court improperly ruled that the expert's drug use was admissible as evidence of bias, fingerprint experts, unlike most state witnesses, are fungible. Normally, the State is stuck with a witness' past because most witnesses are not fungible. For example, in the case of an eyewitness who has a prior conviction, the State has no choice but to present the eyewitness because the witness has unique information. However, this is not true of experts; the State can merely substitute one fingerprint expert for another. Fingerprint experts are widely and freely available to the prosecution. If the trial court had allowed trial counsel to impeach Bruce Scott with his drug use, the prosecutor merely would have substituted another fingerprint expert to identify the fingerprint as Reed's. Basically, the State could have done

at trial what it did at the evidentiary hearing, namely called Ernest Hamm to verify the fingerprint as Reed's. The prosecutor could have just substituted Ernest Hamm for Bruce Scott as the State's fingerprint expert at trial. Indeed, the prosecutor testified at the evidentiary hearing, that that was exactly what he would have done. (EH Feb. 21 at 177). In sum, such an attempt by trial counsel would have been futile. Either the trial court would have ruled such impeachment a collateral matter and therefore, inadmissible or the prosecutor would have end rounded any ruling allowing such impeachment by calling another unimpeachable expert. Counsel is not ineffective for refusing to engage in totally futile impeachment efforts.

ISSUE VII

DID THE TRIAL COURT PROPERLY DENY THE INEFFECTIVENESS CLAIM RELATING TO HIS NON-SECRETOR STATUS? (Restated)

Reed asserts that his trial counsel was ineffective in handling the serology evidence of his non-secretor status. The State respectfully disagrees. As the trial court properly found none of the secretor status testimony at the evidentiary hearing showed that the trial testimony regarding the blood type was invalid or incorrect. Thus, the trial court properly denied this claim.

The trial court ruling

The trial court ruled:

> This particular claim relates directly to the defendant's contention that trial counsel should have consulted with an independent serologist. That issue has previously been discussed in this order. This Court can find no deficiency on the part of trial counsel as the matter of

> the defendant's non-secretor status and the statistics related thereto were, in fact, presented to the jury.

(Order at 17).

Merits

This claim is merely a repeated version of ISSUE III. The State adopts its arguments in ISSUE III as to this claim.

ISSUE VIII

DID THE TRIAL COURT PROPERLY FIND NO INEFFECTIVENESS FOR DECIDING NOT TO CHALLENGE THE CHAIN OF CUSTODY? (Restated)

Reed asserts that trial counsel was ineffective entering a stipulation regarding the chain of custody for the hair samples and the storage of the check on which the defendant's fingerprint was located. This claim was abandoned at the evidentiary hearing. Furthermore, as the trial court found, there was no way counsel could have had this evidence excluded. Thus, the trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court ruled:

> No evidence was actually presented by the defense at the evidentiary hearing. During the course of its direct examination of trial counsel, the state did inquire as to his reasons for entering into the stipulation. From his testimony, the Court concludes that his doing so was appropriate under the circumstances and, in fact, likely enhanced his credibility before the jury. Trial counsel's testimony indicated that he knew that the state could establish the chain of custody and that the evidence would be admitted (this Court infers), but it would have been inappropriate to object. Regarding trial counsel's performance on this issue, a somewhat trite phrase comes to mind. "Do graciously that which you must do anyway." This Court concludes that by failing to offer any evidence

> on the issue the defendant has abandoned this claim. Even if he has not done so, the evidence before the Court is such that this Court concludes that trial counsel's performance was not deficient on this issue.

(Order at 9).

Evidentiary hearing testimony

The State called trial counsel to the stand and Mr. Nichols testified that it is his policy to stipulate to chain of custody when he knows that the State can prove it. (EH Feb. 21 at 208). Mr. Nichols testified that entering stipulations is good trial strategy because counsel should do "everything you can do to subtly enhance your credibility" with the jury. Counsel also noted that you cannot win chain of custody arguments anyway.

Abandonment

Reed did not pursue this claim at the evidentiary hearing. Indeed, post-conviction counsel did not call trial counsel to the stand and when the State called trial counsel to testify as to other claims, post-conviction counsel did not explore this claim. When a defendant is granted an evidentiary hearing on a claim and then fails to present any evidence or testimony in support of that claim, he has abandoned the claim. *Owen v. State*, 773 So.2d 510, 515 (Fla. 2000)(finding a waiver of ineffectiveness claim based on conduct at the evidentiary hearing to prevent the factual development of the issue); *Cf. Shere v. State*, 742 So.2d 215, 218 n. 6 (Fla.1999)(finding that issues raised in appellate brief which contain no argument are deemed abandoned). Thus, Reed has abandoned this claim of ineffectiveness.

Merits

At trial, defense counsel entered a stipulation that the check with the defendant's fingerprint was seized from the victim's home by FDLE and kept on the evidence locker. (Trial at 713). Entering into stipulation is not ineffective. *Pope v. State*, 569 So.2d 1241, 1246 (Fla. 1990)(holding counsel is not ineffective for stipulating to a proven fact and observing that such a conclusion would preclude counsel from ever entering into such stipulations which serve to avoid the unnecessary consumption of time at trial). It is not deficient performance to stipulate to basic facts. Defendants simply do not win chain of custody arguments. *Creme v. State*, 752 So.2d 1238 (Fla. 3d DCA 2000)(admitting into evidence the cocaine seized from defendant without requiring the state to establish a complete chain of custody because there was nothing of record which would support a reasonable probability of tampering). Chain of custody objections, unless there are unique facts, are futile. Counsel is not deficient for recognizing that he cannot prevail under current law.

Additionally, there is no prejudice. Reed has not established any prejudice from his counsel's stipulation of chain of custody. Reed would need to establish a probability of tampering. *Davis v. State*,788 So.2d 308, 310. (Fla. 5th DCA. 2001)(explaining that to bar the introduction of otherwise relevant evidence due to a gap in the chain of custody, a defendant must show there was a probability of tampering with the evidence, a mere possibility of tampering is insufficient); *Terry v. State*, 668 So.2d 954, 959, n.4 (Fla. 1996)(noting that

a bare allegation of tampering by the defendant is not sufficient to break the chain *citing* Charles W. Ehrhardt, Florida Evidence § 901.3 (1994 ed)). Reed has not alleged either a gap or the probability of tampering. Thus, counsel was not ineffective for stipulating to the chain of custody for the hair samples and the check.

ISSUE IX

DID THE TRIAL COURT ERR IN FINDING NO INEFFECTIVENESS IN COUNSEL CONCEDING GUILT TO A LESSER OFFENSE FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Reed asserts his trial counsel was ineffective for conceding theft in closing and that the crime was heinous. The State respectfully disagrees. This claim was abandoned. Furthermore, trial counsel conceding to a lesser included offense of the charge crime is not ineffectiveness *per se.* Trial counsel did not concede the HAC aggravator. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

The trial court's ruling

The trial court, in its order denying post-conviction relief, rejected this claim, reasoning:

> In this claim, the defendant asserts that trial counsel inappropriately conceded the defendant's guilt of robbery during closing argument. The defendant further suggests that counsel's reference to the facts of the case as being especially heinous were inappropriate and detrimental to the defendant. The defendant has offered no evidence in support of this claim, either by way of the defendant's own testimony or by questioning trial counsel on this issue during the course of the evidentiary hearing. Accordingly, the Court concludes that the defendant has abandoned the claim.
>
> In this claim the defendant cites to Mills v. State, 714 So.2d 1198 (Fla. 4th DCA 1998). This Court recognizes that

case stands for the proposition that confessing a client's guilt sets forth a colorable claim for ineffective assistance of counsel. Conversely, the state suggests that the defendant is actually arguing Nixon v. Singletary, 758 So.2d 618 (Fla. 2000). The state further argues that Nixon does not apply to the facts of this case.

Even if the defendant has not abandoned this claim, in the light most favorable to him, the transcript of trial counsel's closing arguments and his explanation thereof during the course of the evidentiary hearing, indicate that his argument in no way reached even the threshold of the defendant's contention. It is noted at this point that Nixon found *per se* ineffective assistance of counsel where trial counsel confessed the defendant's guilt of all crimes charged without the consent of the defendant. In this case trial counsel's argument cannot be construed as a confession of defendant's guilt. At worst, one might opine that trial counsel suggested to the jury that the defendant might be guilty of some lesser crime. At least two (2) post-Nixon cases suggest that concession to a lesser included offense is not *per se* ineffectiveness, but might actually be the appropriate tactical decision to be made by trial counsel. See, State v. Williams, 797 So.2d 1235 (Fla. 2001) and Atwater v. State, 788 So.2d 223 (Fla. 2001).

Upon the trial transcript and trial counsel's testimony at the evidentiary hearing, the Court concludes that trial counsel's argument was merely a discussion of reasonable doubt with the jury. For example, in one portion of his argument, trial counsel queried:

> What if there were testimony that he entered the house with the intention of either asking for money and thinking that there was no one there and getting money and what if he was horrified to have found Betty Oermann there having been murdered and raped and that in that state of confusion or drinking or whatever, he went ahead and took Betty Oermann's purse.

Trial counsel further suggested that the jury might conclude that the soft drink baseball cap got left at the victim's home sometime after her husband left and before he returned. Trial counsel then suggested that "beyond that everything else is speculation." Trial counsel further suggested to the jury that they could "legitimately on this evidence find him guilty of theft" but then suggested that to "find Grover Reed guilty of robbery, rape or murder you have to play the odds." During the course of the evidentiary hearing, trial counsel testified that he was merely trying to convince the jury that although Reed may have done something, it was not premeditated murder but rather that it "boiled out

> of some unexplained situation." His apparent purpose was to suggest that the jury find the defendant guilty of some lesser charge. (See, II.21-25, p. 211 E.H. February 21, 2002).
>
> Upon the matters presented, this Court concludes that it has not been demonstrated that trial counsel's performance was deficient on this issue. This Court concludes that trial counsel made an informed tactical decision based on the evidence as he knew it to be at the time of the trial and in light of his assorted conversations with his client.

(Order at 17-19).

Defense counsel's comments at trial

During closing of the guilt phase, defense counsel was explaining that the State has a beyond a reasonable doubt burden of proof. Defense counsel noted that although the facts of the crime were "so awful, so repulsive and offensive" that the jury should not convict based on any misplaced desire to convict. (XIV 741). Defense counsel, in his second closing argument after the prosecutor gave the State's closing argument, wondered "what if there were testimony that he entered the house with the intention of either asking for money and thinking that there was no one there and getting money and what if he was horrified to have found Betty Oermann there having been murdered and raped and that in that state of confusion or drinking or whatever, he went ahead and took Betty Oermann's purse" (XIV 788). Defense counsel opined that the jury would conclude that the cap got left at the house between the time Reverend Oermann left at 5:45 and the time that he returned" but "beyond that everything else is speculation" (XIV 789). Defense counsel also stated that being a thief does not make you a rapist and murderer. (XIV 789). Defense counsel stated that the jury could "legitimately

on this evidence find him guilty of theft" but to "find Grover Reed guilty of robbery rape or murder you have to play the odds" (XIV 790). Returning to the beyond a reasonable doubt theme, defense counsel observed that "this is such a heinous event and it is heinous and this is such a despicable human being that there's no proof of that, that you should play the odds that you should find this man guilty on speculation on the speculation of an even that is no more likely than the scenario that I gave you or others that could be proposed". (XIV 792).

Evidentiary hearing testimony

At the evidentiary hearing, APD Chipperfield testified that "especially" in a capital case, counsel should conform the defense theory in the guilt phase with the mitigation theory in the penalty phase, and if the two are inconsistent it is "much harder to convince a jury to spare someone's life" (EH Feb 21 at 98).

Reed's trial counsel, Mr. Nichols, testified at the evidentiary hearing that he was trying to convince the jury in final closing that although Reed may have done this, it was not premeditated murder but rather it "boiled up out of some unexplained situation" and try to get the jury to reduce the charge to second degree murder. (EH Feb 21 at 211).

Abandonment

Reed did not pursue this claim at the evidentiary hearing. Reed did not testify although granted an evidentiary hearing. (EH Feb 22 at 16). Reed must testify to support this claim or have trial counsel admit that he did not consent to the

concession of the charged crime. Neither occurred at this evidentiary hearing. Trial counsel, Mr. Nichols, was not called to the stand by Reed at the evidentiary hearing and Reed did not question trial counsel regarding this issue when the State called Mr. Nichols. (EH Feb. 21 at 173,174-175).

Merits

In *Nixon v. Singletary*, 758 So.2d 618 (Fla.2000), the Florida Supreme Court held that it was ineffective *per se* to concede guilt to the charged crime in a capital case without the defendant's explicit consent. Nixon's counsel, in closing argument, stated to the jury: "I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." Nixon asserted that counsel's statement were the equivalent of a guilty plea by his attorney entered without his consent. The *Nixon* Court applied *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) rather than *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).[11] The Florida Supreme Court

[11] The *Nixon* Court relied on three federal circuit cases: *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir.1991); *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir.1988) and *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir.1981). Both *Swanson* and *Wiley* were non-capital cases. Unlike a non-capital case where there is no reason to concede to the charged crime, in a capital case conceding to the charged crime is a reasonable trial tactic. In the words of one court, it is "necessary for counsel to retreat from an unlikely acquittal of a patently guilty client, so that he might attain the more realistic goal of saving the client's life." *Young v. Catoe*, 205 F.3d 750, 760 (4th Cir. 2000). Counsel's focus in a capital case is on the sentence, not the conviction. Obtaining a life sentence is

remanded for an evidentiary hearing to establish whether the defendant in fact consented to his counsel conceding his guilt.

However, while conceding guilt to the charged offense without the defendant's explicit consent is *per se* ineffectiveness, conceding to a lesser included offense is not. ***State v. Williams***, 797 So.2d 1235, 1240 (Fla. 2001)(distinguishing situation where counsel concedes to lesser included offense from *Nixon* where counsel conceded his client's guilt to the crime charged); ***Atwater v. State***, 788 So.2d 223, 229 (Fla. 2001)(holding, in a capital case, that it is not *per se* ineffectiveness to concede to second degree murder rejecting any consideration of manslaughter and admit the crime was one of malice).

In ***Atwater v. State***, 788 So.2d 223, 229 (Fla. 2001), the Florida Supreme Court held that counsel was not ineffective for conceding to second-degree murder in closing. At the evidentiary hearing, Atwater's counsel testified that he did not

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winning a capital case. Moreover, the Ninth Circuit has declined to apply this rule to non-capital cases. *Anderson v. Calderon*, 232 F.3d 1053, 1087 (9th Cir.2000). Furthermore, the other federal circuits have refused to apply *Cronic* or find *per se* ineffectiveness under these facts. *Baker v. Corcoran*, 220 F.3d 276, 295 (4th Cir.2000); *Hale v. Gibson*, 227 F.3d 1298, 1323 (10th Cir. 2000)(holding counsel was not ineffective when, during closing argument of the guilt phase, counsel stated there was no doubt defendant was involved in capital crime, in light of overwhelming evidence but argued the extent of his participation and that he was not the only participant because it was a reasonable strategic decision to concede some involvement by Hale, given the overwhelming evidence presented at trial, and focused on the extent of his involvement and whether others could have been involved). The Eleventh Circuit has likewise applied *Strickland* and failed to find prejudice. *Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001).

believe Atwater had any chance of acquittal. His strategy was to save Atwater's life. Co-counsel testified that although he did not recollect a specific conversation as to whether Atwater would consent to such a strategy but that he always explains his strategy to his clients. The *Atwater* Court held that defense counsel properly made a strategic decision to argue that the facts showed second-degree murder, not first-degree murder. The concession was made to a lesser crime during rebuttal. In light of the overwhelming evidence against Atwater, defense counsel properly attempted to maintain credibility with the jury by being candid. Defense counsel's concession, which was made only in rebuttal to the State's closing argument, unlike *Nixon*, was reasonable.

Furthermore, the claim is that counsel conceded to the charged crime of robbery, not murder. Counsel may concede to one of the charged crimes in a multi-count case. Counsel could have conceded to either or both the robbery and the rape, provided he did not concede to the first-degree murder count, without violating *Nixon*. Here, counsel did not even admit to robbery. Counsel admitted to the lesser of robbery, *i.e.*, theft. Defense counsel stated that the jury could "legitimately on this evidence find him guilty of theft" but to "find Grover Reed guilty of robbery rape or murder you have to play the odds" (XIV 790). Indeed, no evidentiary hearing is warranted when the allegation is a concession to a lesser included offense. *State v. Williams*, 797 So.2d 1235, 1240 (Fla. 2001)(concluding, in a capital case, that the trial court did not err in denying an

evidentiary hearing where the claim of ineffectiveness was an admission by the attorney that the defendant shot the victim during a "scuffle"). Here, as in *Williams* and *Atwater*, counsel's admission was not to the charged crime and therefore, *Nixon* does not apply.[12]

Counsel did not concede that the heinous, atrocious and cruel aggravator existed. Counsel conceded that the crime was heinous in the guilt phase in an attempt to make sure the jury held the State to the beyond a reasonable doubt standard of proof and to warn the jury against a misguided desire to have someone convicted. This is not a concession to the heinous, atrocious and cruel aggravator. Counsel did not concede to the charged crime and did not concede to the aggravator and therefore, there is no basis for this claim of ineffectiveness.

ISSUE X

DID THE TRIAL COURT ERR IN FINDING NO INEFFECTIVENESS FOR FAILING TO PRESENT MITIGATION? (Restated)

Reed asserts ineffectiveness of counsel for failing to present mitigating evidence of the defendant's family and background and for failing to present mental health experts. The State respectfully disagrees. As the trial court found, Reed wavied

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[12] Nixon may not apply for another reason. Nixon was absent from the courtroom when his counsel conceded his guilt to the charged crimes. *Nixon v. Singletary*, 758 So.2d 618, 620, n.3 (Fla. 2000). The Fifth Circuit has held that defense counsel's opening argument explicitly conceding defendant's guilt was ineffective assistance *per se* when the defendant was present and objected to counsel's concession. *Haynes v. Cain*, 272 F.3d 757 (5th Cir. 2001). Reed, unlike Nixon, was present when his counsel made the concessions at issue but did not object unlike the defendant in *Haynes*.

presentation of mitigation and told his counsel not to contact his family and therefore, is precluded from raising an ineffectiveness claim. Moreover, the family and background mitigation was a double-edged sword. His brother's testimony was nearly collateral bad acts testimony. Furthermore, the mental health testimony was not helpful to the defendant; rather, it was harmful. A diagnosis of anti-social personality is not helpful. Counsel is not ineffective for recognizing this. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

The trial court's ruling

The trial court ruled:

> Neither defense mitigation evidence nor further aggravation evidence from the state was presented to the jury. Counsel merely presented argument and the matter was submitted for the jury's recommendation. The defendant now contends that trial counsel was ineffective for failing to present mitigation evidence relating to his family and personal background (this claim), and failing to present mitigating psychiatric/psychological testimony (the next claim).
>
> At the evidentiary hearing, it was uncontroverted that the defendant specifically refused to permit trial counsel to offer mitigation which would in any way suggest his guilt of the crimes with which he had been charged. Furthermore, apparently on at least two (2) occasions, the defendant instructed trial counsel not to involve family members in the trial. (See 1.21, p. 210 through 1.9, p.212 E.H. February 21, 2002). That the defendant gave trial counsel such instructions is confirmed (albeit indirectly) by the handwritten waiver form signed by the defendant. While the form is more directly related to the defendant's waiver of trial evidence, paragraphs seven (7) and twelve (12) confirm trial counsel's testimony regarding the defendant's instructions declining any evidence of his guilt. It also confirms that trial counsel and the defendant discussed the admission of psychological evidence. The entire form is included herewith to insure context. (Bolding is supplied).
>
> 1. I am Grover Reed, the defendant in 1st Degree Murder case in Duval County, Fla., Cs: 86-6123 CF Div. W.

2. Throughout this case both publicly and privately and in all conversations with my attorney I have constantly maintained my complete innocence of all these charges.

3. I have complete and clear recollection of the events before during, and after Feb. 27, 1986. There are no voids or gaps in my memory of this period.

4. On Feb. 27, 1986 I was never at or near the residence of Betty Oermann, the victim in this case.

5. I have not provided my attorney with the names of any people who were with me from the time Mike Shelboure left me with the broken down auto (about 2:30 p.m. 2-27-86) until I returned home to the trailer park because I was not with nor did I see anyone whose name I know during that time.

6. My attorney has discussed with me the possibility of a defense based on a theory that I in fact killed the victim but was temporarily insane.

7. **I have refused to allow my attorney to assert or put forward any defense which assumes or implies I murdered Betty Oermann.**

8. I under the State argues 1st and last during closing argument .. if I call any witnesses other than myself. But my attorney argues 1st and last if I call no witness other than myself.

9. Although my attorney and I have discussed calling certain witnesses I believe that no witness could establish and alibi for me and no witness could contribute evidence which was not available either through my own testimony, if I testify, or through the states own witnesses.

10. I have therefore instructed my attorney to call no witnesses nor to offer any evidence in my behalf so my attorney can have 1st and last argument in

11. My attorney has advised me that there is a high likelihood that I will be convicted of 1st Degree Murder and if convicted that I will be given the death penalty.

12. **My attorney has advised me that he believe the chances of being sentenced to death were hypothetically <u>less</u> if I pled guilty and presented mitigating psychological evidence**.

13. No offers have been made by the State to induce me to plead.

14. I have advised my attorney that although I understand his advice I will not plead guilty because I am not guilty.

11-19-86
(Signed Grover B. Reed)

This court concludes that the defendant waived the presentation of mitigation evidence by his instructions to counsel. He cannot now be heard to complain.

At the evidentiary hearing, the defendant called a brother, a sister, a former school coach. Although the brother and sister related that they were aware of the defendant's trial, both agreed the defendant had not contact them and that they had only gleaned this information through the defendant's grandmother. According to their testimony, it was this grandmother who provided most of the maternal supervision for the defendant during his formative years.

All three (3) defense witnesses on this issue testified to the defendant's horrific childhood, his substance abuse, and his propensity to violence. None of them testified that they had attempted to contact the defendant's lawyer and offer themselves to testify. Having heard their testimony, this Court observes that it is quite plausible to conclude that in 1986, no one in this family, residents of a rural area near Nashville, Tennessee, had the financial wherewithal to travel to Jacksonville to testify. The defendant has offered no evidence that they were actually available to testify at trial. In fact, though the matter was not raised by either side during the course of the evidentiary hearing, at the presentation of mitigating evidence to the trial judge, trial counsel related that certain witnesses were unavailable to testify. (p. 916, TT).

I want to alert the Court, too, that we had passed the matter to today to try to get witnesses here from out of state to testify in Mr. Reed's behalf, primarily in the fashion of character witnesses and because of finances and logistics, none of those people are available and I don't have any reasonable likelihood that they're going to be available so I cannot and will not at this time ask the Court to delay this hearing any further on that basis.

Nothing in the record indicates that these family members were the witnesses of which trial counsel spoke. In assessing the evidentiary hearing testimony, this Court concludes that it is highly unlikely that the jury would have considered this evidence to be mitigating. In fact, the brother related an instance in which he had taken the defendant into his residence because of the defendant's destitute situation. During the course of that stay, the

brother found that the defendant was continuing his substance abuse and essentially evicted him from his home. Sometime during the course of this conflict, the defendant threatened the brother's wife. These facts, had they been heard by the jury, seem to be entirely too similar to the evidence adduced during trial, that being that the defendant was again taken into someone's residence, again lost his permission to be in the residence, and again threatened the woman of the house. The jury might also have heard that on one (1) occasion, the defendant had actually physically abused his grandmother and broken her nose. Without regard to this Court's observations hereafter, had this evidence been known to trial counsel at the time, it is likely that he would not have opted to introduce it. If nothing else, the evidence would tend to support the state's trial position that the defendant was a substance abuser prone to violence.

It should also be noted that had these family members testified, they would have more than likely been cross-examined by the state on the defendant's criminal record, his substance abuse, his propensity to violence and his otherwise questionable character. Although trial counsel might not actually have known at the time what the family members would have testified to (as he followed his client's instructions not to contact them), it is implausible to believe that he would have called them to the stand to have the jury learn anything about his client which was consistent with the state's position in the case.

Lastly, this Court notes that the testimony of the defendant's brother at the evidentiary hearing supports trial counsel's testimony that the defendant wanted his family members to have no part in the defense. According to the brother, the defendant left Tennessee following a fight with the brother and was never heard from again until the grandmother, at some point, related the defendant's situation. In fact, the brother testified at the evidentiary hearing that it was some ten (10) years later when he was actually contacted by anyone (and it wasn't the defendant) regarding the case against the defendant. That the defendant didn't contact his brother for at least ten years confirms the defendant's desire that his family not be involved in his defense.

Forgetting for a moment this Court's conclusion that defendant effectively waived the opportunity to present mitigation evidence, upon the evidence actually presented at the evidentiary hearing, this Court cannot conclude that there was any deficiency on the part of counsel had the witnesses been available for trial. It seems obvious that the negative nature of their testimony about the defendant would have been so damaging to the defendant as to far outweigh any mitigative qualities that there may have been to the evidence regarding the defendant's less than pleasant childhood. Accordingly, even if the

> evidence had been known to trial counsel, this Court cannot conclude that, had the witnesses testified, there would have been any difference in the outcome of the trial. In fact, it appears more likely than not that had they testified, the result would have been virtually the same.
>
> In sum, this Court concludes that the defendant has failed to establish any deficiency on the part of trial counsel for failing to call the family members proposed as witnesses by the defendant.

(Order at 21-25)

Evidentiary hearing testimony

At the evidentiary hearing, Reed's brother and sister and a former coach testified as mitigation witnesses. William Reed, the defendant's older brother, testified. (EH Feb. 21 at 8,32). William testified that no one attempted to contact him to see if he would testify. (EH Feb. 21 at 9). He was aware that the trial was taking place and that Grover was in contact with their grandmother during the trial. (EH Feb. 21 at 9,36). However, Grover was not speaking to him because he was mad at him. (EH Feb. 21 at 36). He described Grover's childhood as "pretty rough" explaining that his parents married at a young age, that their father was "bad" about drinking and fought often with their mother. (EH Feb. 21 at 10). There were four children in the Reed family: William, Diana, Tony and Grover. (EH Feb. 21 at 35,108-109). None of the other siblings have ever been arrested for murder. (EH Feb. 21 at 47). He recounted an evening when he was four years old, when his mother shot his father with a shotgun killing him. (EH Feb. 21 at 11). Grover was six weeks old at this time. (EH Feb 21 at 39). All four of the Reed children went to live with their grandmother. (EH Feb. 21 at 11-12). Their mother remarried a man named Charles

Lassman, who was in the military and the children went to live with them. (EH Feb. 21 at 12-13). Their step-father was a violent man who beat their mother and the children. (EH Feb. 21 at 14,24,25). The step-father referred to them as dogs because they were part native Americans. (EH Feb. 21 at 16). The mother beat the children also and neglected them. (EH Feb. 21 at 25,26). The children returned to live with their grandmother. (EH Feb. 21 at 16,26). The children loved their grandparents. (EH Feb. 21 at 17). His grandmother spoiled Grover; however, she was not able to control him. (EH Feb. 21 at 27-28). The grandfather sexually abused his sister but Grover was not aware of the abuse. (EH Feb. 21 at 29). The family situation caused Grover to become extremely nervous and he was prescribed valium for his nerves at 15 years of age. (EH Feb. 21 at 17). Grover starting sniffing gas at 10 years of age. (EH Feb. 21 at 18). As an adult, one time when Grover was using drugs, his grandmother became upset with Grover for sniffing gas in the house. (EH Feb. 21 at 44). Grover hit his grandmother breaking his grandmother's nose. (EH Feb. 21 at 19,20,43,44). The family sent him to a drug rehabilitation center at Central State after this incident. (EH Feb. 21 at 19,21,42). However, regardless of the six weeks treatment program, Grover's drug use continued. (EH Feb. 21 at 22,43). His brother referred to "some trouble" that Grover got in. (EH Feb. 21 at 23). He was in jail on several occasions. (EH Feb. 21 at 45,46). His brother allowed Grover to live with him on the condition that Grover not take any drugs (EH Feb. 21 at 23). However, William's wife and son

discovered a needle in a couch. (EH Feb. 21 at 23). Grover threatened to kill William's wife (EH Feb. 21 at 23). William made Grover move out of his house. (EH Feb. 21 at 24). Shortly afterward, Grover moved to Florida and this murder occurred.

Diana Reed, Grover's older sister, also testified at the evidentiary hearing. (EH Feb. 21 at 103). She was two years old when her mother shot her father but she testified that everything about the incident had been told to her and that Grover was two months old . (EH Feb. 21 at 104,109). Their step-father would beat both her and Grover with a soap on a rope and make them sleep on the floor for wetting the bed. They lived with their step-father for eight months. (EH Feb. 21 at 105). Their mother did not protect them and would beat them herself. (EH Feb. 21 at 106). Grover started wetting the bed when they lived with their step-father. (EH Feb. 21 at 108). They went to live with their grandmother. (EH Feb. 21 at 106). None of the other sibling were ever arrested for murder or for a crime of violence. (EH Feb. 21 at 111-112,115). Both Tony and her have drinking problems but she has been through treatment and no longer drinks. (EH Feb. 21 at 113-114). Grover was prescribed medication for his nerves. (EH Feb. 21 at 114).

Coach Yates, Grover's middle school coach, testified. (EH Feb. 21 at 115). Grover spent four years in middle school repeating both the seventh and eighth grades which was hard for him - being around younger kids. (EH Feb. 21 at 117,119). He was a good football player who showed some leadership potential. (EH Feb. 21 at 118,125). The coach testified that on several

occasions Grover had been drinking when he came to school. (EH Feb. 21 at 120,126-127). His family did not provide the support necessary to do his homework. (EH Feb. 21 at 121). Grover fell behind because he was not applying himself, not because of any lack of intelligence. (EH Feb. 21 at 124). Coach Yates was unaware that Grover had been arrested previously. (EH Feb. 21 at 130).[13]

Reed's trial counsel, Mr. Nichols, testified that Reed did not want his family or friends to have to be subjected to this process. (EH Feb 21 at 210-211). Counsel explained the risks of not putting any mitigating evidence on at the penalty phase[14] and that he informed Reed that there was a high likelihood that he would be convicted due to the strength of the State's case in numerous categories.(EH Feb 21 at 211). He testified that after the verdict came back guilty, they again discussed that

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[13] Chris Niznik, who was Grover's girlfriend and was living with Grover in the trailer park at the time of the crime, testified at the evidentiary hearing. (EH Feb. 21 at 133). She testified that both she and Reed had a substance abuse problem. (EH Feb. 21 at 143,149). He would make stove top which is a type of crystal meth and that they would inject it. Grover "possibly" could have been using stove top "around" the time of the murder. (EH Feb. 21 at 144). He also drank a lot of beer. (EH Feb. 21 at 145). Reed also huffed gasoline. (EH Feb. 21 at 146). His abuse of substances was pretty constant. (EH Feb. 21 at 147)

[14] The trial in the case was conducted in 1986 which was prior to *Koon v. Dugger*, 619 So.2d 246 (Fla.1993), and *Farr v. State*, 621 So.2d 1368 (Fla.1993), which mandate certain procedures to be followed when a defendant elects to not present mitigating evidence during the penalty phase including requiring counsel to list possible mitigating evidence. Reed did not testify as he cannot establish that his decision not to present mitigating evidence was not an informed one.

presentation of mitigating evidence and Reed told him again that he didn't want his family involved.(EH Feb 21 at 211). Counsel referred to the affidavit written by the defendant stating that he did not want these people called in mitigation.(EH Feb 21 at 212).[15]

Merits

First, Reed never established that these witnesses were available at the time of trial.[16] William Reed testified that he knew that the trial was being held both through his grandmother and the newspapers but did not attempt to contact anyone. (EH Feb. 21 at 37-38). William Reed never explained why he never contacted Reed's lawyer. Nor did the sister. These witnesses were not available. Reed's brother and sister had actual, personal knowledge that the trial was going on yet did not even

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[15] APD Chipperfield testified that had represented capital defendants who refused to present mitigating evidence. (EH Feb 21 at 94). He referred to another case, *Durocher*, where the defendant would not allow him to present any mitigating evidence. *Durocher v. State*, 604 So.2d 810 (Fla. 1992) (holding that the trial court was not required to appoint special counsel to present mitigating evidence when the defendant voluntarily waived the presentation of mitigating evidence and stating that Durocher had instructed his counsel not to present any mitigating evidence or to challenge the prosecution's presentation of evidence). He testified that initially defendants are despondent and tell counsel not to bother with mitigation but that counsel should attempt to talk with their client further and not accept their initial refusal. (EH Feb 21 at 98-99).

[16] At the December 18, 1986 *Spencer* hearing, defense counsel referred to motion for continuance that had been granted to present out-of-state witnesses on Reed's behalf. (Trial at 916). However, defense counsel explained that due to finances and logistics none of those people are available" and there was no reasonable likelihood that they would become available." (Trial at 916).

bother to make a phone call to either Reed or defense counsel see if they could be of any assistance to the defense. One of the reason for public trials is that person with information will come forward and testify. Counsel cannot be ineffective for failing to present unavailable witnesses. *Williamson v. Moore*, 221 F.3d 1177, 1181 (11th Cir. 2000)(explaining that counsel cannot be said to be ineffective for failing to call an unavailable witness).

Additionally, this evidence is not mitigating.[17] His brother's testimony establishes a pattern. Grover attacks women who let him live in their homes. Grover beat his beloved grandmother, who had raised him and saved him from his violent step-father, breaking her nose. This testimony would have been quite damaging. It established that Grover is violent even towards a woman who loved and cared for him. The parallels between Grover going to live with his brother's family and the instant crime are even more striking. Grover violated the ban on not using drugs in their home and then threatened to kill his brother's wife after she discovered that Grover was using drugs in her house. This pattern repeated itself with the Reverend's wife. Basically, the prosecutor would have had a field day with this "mitigating" evidence, using it to establish that Grover violently attacks women who make the mistake of helping him by letting him live in their homes like the victim in this case did. Furthermore, William, Grover's elder brother, described

[17] APD Chipperfield testified that he was exploring presenting his childhood as mitigating but did not give any specifics. (EH Feb. 21 at 73).

Grover as a “con artist” (EH Feb 21 at 28). This description is a layman’s term for antisocial personality. The prosecutor could have exploited this statement as well.

Counsel is not ineffective for recognizing that this family testimony, while establishing some mitigating circumstances, was, in large measure, aggravating. Courts have not found ineffectiveness for failing to present mitigating evidence of the defendant’s background where it is such a double-edge sword. *Carroll v. State*, 815 So.2d 601, 614-615 & n.16 (Fla. 2002)(rejecting an ineffective assistance of counsel claim for failing to present the defendant’s upbringing, including physical and sexual abuse, substance abuse, and his mental problems as mitigation because the presentation of these witnesses would have allowed cross-examination and rebuttal evidence regarding Carroll’s prior sexual misconduct with children, including an incident with his own niece, that would have likely countered any additional value Carroll might have gained from such testimony); *Asay v. State*, 769 So.2d 974, 988 (Fla.2000)(rejecting ineffectiveness claim for failing to present defendant’s abusive childhood as nonstatutory mitigation because the evidence opened the door to damaging cross-examination about the defendant’s violent past); *Rose v. State*, 617 So.2d 291, 295 (Fla.1993)(explaining that in light of the harmful testimony that could have been adduced from Rose's brother and the minimal probative value of the cousins’ testimony, the outcome would not have been any different had their testimony been presented at the penalty phase); *Medina v.*

State, 573 So.2d 293, 298 (Fla.1990) (finding no ineffectiveness in not presenting witnesses where they would have opened the door for the State to explore defendant's violent past).

In *Davis v. Executive Dir. of Dep't of Corrections*, 100 F.3d 750, 762 (10th Cir.1996), the Tenth Circuit found no ineffectiveness because the decision to present mitigation testimony from family members was fraught with peril, because the defendant's background contained numerous instances of conduct that were more likely to make a jury feel unsympathetic rather than sympathetic towards him. Davis' brother described him having a devil-may-care type attitude and having an alcohol problem. His brother, when asked how he felt about the homicide, stated that it was the inevitable conclusion to his brother's life story. The Court concluded that his brother's assessment was not likely to be viewed by the jury as mitigating; rather, it suggests he was a reckless and irresponsible man, whose life story was appropriately concluded by the tragic murder. Further discussion with his brother was likely to produce evidence at least as damaging to the defendant and therefore, he suffered no prejudice. *See also Duvall v. Reynolds,* 139 F.3d 768, 782 (10th Cir 1998)(finding counsel was not ineffective for failing to present family members to establish troubled background where each of the defendant family members were aware of his prior convictions and violent tendencies when drinking because cross-examination concerning the factual circumstances of the defendant's prior violent conduct could have been devastating and counsel was not

ineffective for failing to present the defendant's substance abuse because testimony concerning his substance abuse would have resulted in the introduction of details of his prior convictions and violent conduct, which invariably resulted from his substance abuse and concluding that the jury could have perceived such evidence as aggravating rather than mitigating); *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001)(concluding counsel was not ineffective in failing to present "horrific" childhood in mitigation because while six of his eleven siblings spent time in jail, it appears that the defendant was the only one convicted of a violent crime); *Burger v. Kemp*, 483 U.S. 776, 788-796 & n.7,107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)(finding no ineffective assistance because of counsel's failure to develop and present mitigating evidence of an exceptionally unhappy and unstable childhood because of the evidence revealing possibly damaging details about his past including the suggestion of violent tendencies and the possible devastating cross-examination).

Here, as *Davis*, the brother's testimony was not likely to be viewed by the jury as mitigating. Reed's brother's testimony, while also suggesting a reckless and irresponsible man, whose life story was appropriately concluded by the tragic murder, is even more unsympathetic. Reed's brother described Reed as a con man, who beat their grandmother while taking drugs, and threatened to kill his wife.

MENTAL HEALTH EXPERTS

Reed also asserts that his trial counsel was ineffective for failing to present psychiatric testimony as mitigation during penalty.

The trial court's ruling

The trial court rejected this claim of ineffectiveness reasoning in part:

> The defendant's psychological expert, candidly admitted to the Court that the testimony that he offered during the evidentiary hearing, had it been offered at trial, would likely have revealed to the jury that, in the expert's opinion, the defendant was a person with tendencies to extreme violence, and whose personality disorder made him the perfect candidate for the kind of crimes committed in this case. It is certainly not ineffective assistance of counsel for any attorney not to call an expert when doing so causes his client to run the risk of having the state successfully make his client look like a sociopathic killer.

(Order at 7).

The trial court further reasoned:

> The defendant contends that trial counsel was ineffective in failing to present psychiatric/psychological testimony during the penalty phase of his trial. As previously noted, at the instruction of the defendant, no mitigation evidence was presented to the jury.
>
> It should also be noted at this point that, although counsel did not present mitigating evidence to the jury, he did present mitigation evidence to the trial court. That evidence consisted of the reports of Dr. Ernest Miller, a local psychiatrist, who had examined the defendant at the request of trial counsel during the course of his representation of the defendant. Dr. Miller's report documented the defendant's substance abuse, huffing of gasoline, and other psychiatric imbalances which were presumably considered by the trial court. In addition, trial counsel introduced hospital admission records indicating drug dependency, and records from a mental health facility showing mental health problems. (pp. 921-922, TT). Although the undersigned has not actually reviewed these records, the state's post-evidentiary hearing memorandum indicates that the records contained a diagnosis of "chronic lead poisoning encephalopathy with seizure disorder."
>
> At the evidentiary hearing, the defendant called Dr. James Larson in support of this claim. Dr. Larson is a

clinical psychologist with extensive experience in forensic evaluations. Dr. Larson had been retained by former post-conviction counsel to examine the defendant approximately six (6) years after the trial, and thus, approximately ten (10) years before the evidentiary hearing.

Upon that examination, Dr. Larson concluded that while the defendant had the capacity to appreciate the criminality of his conduct, his capacity to conform his conduct to the law was impaired. (II.6-9, p. 75, E.H. February 19, 2002). In his diagnosis, Dr. Larson concluded that the defendant exhibited impaired judgment, educational deprivation, cultural deprivation, physical abuse, emotional abuse, drug use, and organic brain syndrom, as non-statutory mitigation factors. Based on the defendant's own history related to Dr. Larson, Dr. Larson noted that defendant's biological mother had killed his father (however, Reed was an infant and had no personal recollection of this event), that defendant's mother had numerous paramours and was an alcohol abuser, that one of the assorted husbands of the defendant's mother had been abusive to the children, that the defendant had resided with his maternal grandmother in a relatively stable environment, that the defendant had been placed in special education classes, that the defendant began abusing alcohol and huffing gasoline at an early age, that the defendant denied huffing gasoline on the day of the murder, that the defendant at one time had been treated for head trauma of some form, and that the defendant had been committed to a psychiatric facility during his youth. Dr. Larson also acknowledged that the defendant was neither schizophrenic nor psychotic and was not delusional.

Dr. Larson's main conclusion was that the defendant had an anti-social personality disorder coupled with a narcissistic personality disorder. Dr. Larson opined that individuals with such disorders tend to be selfish, self-indulgent, and frequently seek thrills without regard to their consequences. He also related that such individuals, including the defendant, are likely to be people who exploit others. Dr. Larson also acknowledged that persons with these disorders are "a criminal personality" and agreed that the disorder is a "predisposition to criminality." At one point, Dr. Larson advised the post-conviction prosecutor that the defendant's sort of disorder "gives you a job because so many of the people you prosecute would suffer from that kind of disorder." (See, at least, pp. 62-64, 67-68, and 70-78, E.H., February 19, 2002). During the course of his testimony, Dr. Larson acknowledged that certain aspects of his examination and testimony might be more helpful to the state than to the defense. (II.14029, p.49, E.H., February 19, 2002). Dr. Larson also acknowledged that it was not out of the ordinary for defense counsel to "steer

away" from using Dr. Larson as a witness when his conclusion was that their client had the same anti-social personality disorder exhibited by defendant Reed. (I.18, p.70 through I.16, p.71, E.H., February 19, 2002).

Assuming for a moment that trial counsel had the defendant's permission to present this form of mitigation evidence, which he did not, this Court concludes that trial counsel would not have offered the testimony of Dr. Larson anyway. Such a decision would have been appropriate given the facts of the murder and rape of which the defendant was convicted and the nature of Dr. Larson's diagnosis. This Court concludes that it is all too likely that this sort of psychiatric testimony would have fit perfectly into the picture of the defendant painted by the state at trial, a substance abuser whose self-indulgence permitted him to commit unrestrained acts against others, including those who had ventured to love and care for him.

At the evidentiary hearing, Assistant Public Defender, initial trial counsel, testified that the concept of offering psychiatric/psychological mitigation evidence is "a real complicated one" where the defendant is diagnosed as a sociopath or with an anti-social personality. According to Mr. Chipperfield, "It is hard to put on a penalty phase where that's your only diagnosis." He further acknowledged that such a diagnosis is not a "real favorable" one, and that at least a large part of the problem is that the diagnosis of anti-social personality is one of a person who basically has no regard for the rights and feelings of others. (I.17, p. 95 - 1.16, p. 96, E.H., February 21, 2002).

Trial counsel testified at the evidentiary hearing that (had Dr. Larson examined the defendant before trial), trial counsel would not have put before the jury the fact that defendant suffered from anti-social personality disorder. Trial counsel related that he didn't think a jury would find that sort of evidence mitigating because anti-social personality disorder with narcissistic tendencies is "essentially the profile of a person who was going to be violent when it fits their need." Trial counsel was further concerned that effective cross-examination by a prosecutor would have brought all of his information out before the jury.

On this issue, then, this Court concludes that the defendant has failed to establish a deficient performance on the part of trial counsel. Even had the defendant granted his permission to present such evidence to the jury, trial counsel understandably would not have done so. Having heard the testimony of Dr. Larson, this Court concludes that, had he testified at trial, the primary thrust of his testimony would have resulted in aggravation against the defendant rather than mitigation for the defendant. Even Dr. Larson acknowledged that it's not

likely that he would have been called as a witness for the defense.

(Order at 26-29).

Evidentiary hearing testimony

APD Chipperfield testified that he was exploring mitigation involving Reed's history of huffing gasoline, organic brain damage, prior drug treatment hospitalizations in an attempt to establish the statutory mental mitigators. (EH Feb. 21 at 71-73). APD Chipperfield was going to attempt to establish Reed's organic brain damage through the medical record from Hendersonville Hospital and Middle Tennessee Mental Health Institute which referred to lead encephalopathy. (EH Feb. 21 at 73).

Reed's trial counsel, Mr. Nichols, testified that while he did not present psychological mitigating evidence to the jury, he presented this evidence to the judge. (EH Feb 21 at 213) He testified that Reed instructed him not to present any of that kind of mitigating evidence to the jury (EH Feb 21 at 213). However, mitigating evidence to the judge who he thought would be more sensitive and more likely to give it serious consideration. (EH Feb 21 at 213-214). He presented Dr. Miller's report to the judge. He presented evidence of Reed's gasoline huffing to the judge. (EH Feb 21 at 213). He also testified that given the particular brutal murder that he would not have presented this evidence to the jury even if free to do so because the jury would be likely to find it a "shallow offer of mitigation." (EH Feb 21 at 213-214). He testified that this was a strategic decision. (EH Feb 21 at 214). Dr. James Larson,

a clinical psychologist testified at the evidentiary hearing regarding possible mitigation. (EH Feb 19 at 19-82). Dr. Larson performed a two day psychological evaluation of Reed in January 1992, approximately six years after the crime. (EH Feb 19 at 23, 55-56). Dr. Larson's tests included the Millon Clinical Multiaxial Inventory II. (EH Feb 19 at 66). Dr. Larson reviewed Reed's school records, hospital records, law enforcement records and inmate records as well as Dr. Miller's prior evaluation. (EH Feb 19 at 26-27, 56-57,73-75). Dr. Larson testified that both statutory and non-statutory mental mitigation was present. (EH Feb 19 at . 29,73). Dr. Larson testified that one of the statutory mitigators was present. (EH Feb 19 at 75). His opinion was that, while Reed had the capacity to appreciate the criminality of his conduct, his capacity to conform his conduct to the requirements of law was impaired. (EH Feb 19 at 75).[18] Dr. Larson listed impaired judgment, educational depravation, cultural depravation, physical abuse, emotional abuse, drug use and organic brain syndrome as non-statutory mitigation. (EH 30). Dr. Larson related that Reed's biological mother had killed his father. (EH

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[18] The mitigating circumstances provision, 921.141(6)(f), provides:

> The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

Hence, the statutory mitigator requires substantial impairment.

Feb 19 at 31). However, Reed was an infant when this occurred and therefore had no independent knowledge of this event. (EH Feb 19 at 38). Dr. Larson testified as to Reed's early life. His mother had numerous boyfriends and abused alcohol. (EH Feb 19 at 32). One of her husbands was abusive to the children. (EH Feb 19 at 32). Reed often lived with his maternal grandmother and during these periods, in this stable environment, his behavior was good. (EH Feb 19 at 39). Dr. Larson testified regarding Reed's placement in special education classes. (EH Feb 19 at 44,46). Reed used alcohol at an early age and huffed gasoline. (EH Feb 19 at 33,45-46). Dr. Larson noted that Reed denied huffing gas on the day of the murder. (EH Feb 19 at 61). Dr. Larson noted that Reed had been treated for head trauma. (EH Feb 19 at 50). Dr. Larson testified regarding Reed's prior commitment to a psychiatric facility. (EH Feb 19 at 36). Dr. Larson agreed that Reed was not schizophrenic, psychotic or delusional. (EH. Feb 19 at 64). Dr. Larson's main diagnosis was that Reed had an anti-social personality disorder with a narcissistic personality disorder. (EH Feb 19 at 64, 67-68, 76-78). Individuals with an anti-social personality disorder are selfish, self-indulgent, and seek thrills without regard to the consequences. (EH Feb 19 at 64-65). Dr. Larson described Reed as a person who exploits others. (EH Feb 19 at 69). Dr. Larson referred to the disorder as "a criminal personality". (EH Feb 19 at 70). Dr. Larson agreed that it was a "predisposition to criminality". He informed the prosecutor that this type of disorder "gives you a job because so many of the people you

prosecute would suffer from that kind of disorder" (EH Feb 19 at 70). Dr. Larson noted such a disorder is hard to treat. (EH Feb 19 at 73).

Dr. Larson explained that certain aspects of his testimony can be more helpful to the State than the defense. (EH Feb 19 at 49). Dr. Larson agreed that often defense attorneys, given a diagnosis of anti-social personality, "steer away" from presenting such testimony to a jury. (EH Feb 19 at 64,71,79-80). Dr. Larson noted that it was rare for him to be called as a mitigation witness when he made such a diagnosis. (EH Feb 19 at 70-71).

APD Chipperfield testified that a diagnosis of anti-social personality is "a real complicated one" and that it was "hard to put on a penalty phase where that's your only diagnosis." (EH Feb 21 at 95). Such a diagnosis is not sympathetic to a jury, "not real favorable", and that because in large part it means that the person has no regard for rights and feeling of others, the diagnosis subjects a defendant to harmful cross examination (EH Feb. 21 at 95-96).

Mr. Nichols, Reed's trial counsel, testified at the evidentiary hearing that he would not have presented Dr. Larson's diagnosis of antisocial personality with narcissistic tendencies to the jury. (EH Feb 21 at 215-216). Mr. Nichols explained that he did not think that a jury would find such a diagnosis mitigating because that particular disorder is "essentially the profile of a person who is going to be violent when it fits their need". (EH Feb 21 at 216-217).

Merits

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) gives the “essential feature of Antisocial Personality Disorder as a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood.” It further states that “deceit and manipulation are central features of Antisocial Personality Disorder” and that individuals with Antisocial Personality Disorder fail to conform to social norms with respect to lawful behavior and they repeatedly perform acts that are grounds for arrest (whether they are arrested or not), such as destroying property, harassing others, stealing, or pursuing illegal occupations. Persons with this disorder disregard the wishes, rights, or feelings of others. They are frequently deceitful and manipulative in order to gain personal profit or pleasure and they repeatedly lie, use an alias, con others, or malinger. Individuals with Antisocial Personality Disorder tend to be aggressive and may repeatedly get into physical fights or commit acts of physical assault (including spouse beating or child beating). Individuals with Antisocial Personality Disorder show little remorse for the consequences of their acts and may be indifferent to, or provide a superficial rationalization for, having hurt, mistreated, or stolen from someone (e.g., "life's unfair," "losers deserve to lose," or "he had it coming anyway"). These individuals may blame the victims for being foolish, helpless, or deserving their fate; they may minimize the harmful consequences of their actions; or they may

simply indicate complete indifference. They generally fail to compensate or make amends for their behavior.

Basically, all any prosecutor would have to do to rebut this mitigating evidence is explain what an anti-social personality is. All the prosecutor would do is have any mental health expert Reed presented read the DSM-IV to the jury.

The Florida Supreme Court's view of antisocial personality disorder is not clear. ***Morton v. State***, 789 So.2d 324 (Fla. 2001)(holding that the trial court's failure to discuss its rejection of antisocial personality disorder as mitigating circumstance was harmless error but implying that the presence of antisocial personality disorder is mitigating); ***but see Ford v. State***, 802 So.2d 1121, 1135-1136 (Fla. 2001)(viewing lack or absence of sociopathic or psychopathic tendencies as mitigating in nature). While the Florida Supreme Court may view antisocial personality disorder as mitigating, juries do not. ***Stafford v. Saffle***, 34 F.3d 1557, 1565 (10th Cir 1994)(explaining that an antisocial, sociopathic personality is a double-edged sword because of the real risk that the jury would see the antisocial, sociopathic personality as an aggravating factor rather than as a mitigating one). Juries are not alone. Many judges also view a diagnosis of antisocial personality as "fancy language for being a murderer." ***Lear v. Cowan***, 220 F.3d 825, 829 (7th Cir. 2000) (characterizing "antisocial personality disorder" or "asocial type," as "fancy language for being a murderer");***Clisby v. Alabama***, 26 F.3d 1054, 1056 & n.2 (11th Cir. 1994)(noting reasons why antisocial personality disorder diagnoses are not

mitigating). Regardless of how certain Justices view such evidence, counsel cannot be ineffective for failing to present such ambiguous evidence to a jury. *Cf Odom v. State*, 782 So.2d 510 (Fla. 1st DCA 2001)(Padovano, J., concurring)(explaining that counsel rarely is ineffective for failing to present a voluntary intoxication defense because such a defense rarely offers a realistic chance of success and observing that most experienced criminal lawyers and judges would be hard pressed to come up with a single example of a case in which the defense of voluntary intoxication succeeded citing *Evans v. Meyer*, 742 F.2d 371 (7th Cir.1984)(rejecting an ineffective claim because "no lawyer in his right mind would have advised [the defendant] to go to trial with a defense of intoxication."). Like intoxication, the mitigation of antisocial personality offered no realistic possibility of the jury recommending life rather than death based on such a diagnosis. Trial counsel is not ineffective for recognizing this reality. Moreover, trial counsel's testimony that he would not have presented this diagnosis even if he had had Dr. Larson's report, precludes any finding of prejudice.

Additionally, any mental health expert testimony that persons who are physically abused as children tend to be violent as adults, also is a double-edged sword. (EH. Feb. 19th at 43) This is equivalent to suggesting that Reed is a violent person.

Counsel is not ineffective for recognizing this double-edged sword as being such.[19]

Furthermore, at least some of this mitigating evidence, in fact, was presented to the trial court during the penalty phase. Dr. Larson testified regarding Reed's prior commitment to a psychiatric facility. (EH. Feb 19 at 36). At the December 1986 *Spencer* hearing, trial counsel introduced hospital records from Hendersonville showing drug dependency and records from Middle Tennessee Mental Heath Institute showing "past emotional and drug problems" to the trial court as mitigating circumstance evidence. (Trial at 921-922). These medical records contain the discharge diagnosis of "chronic lead poisoning encephalopathy with seizure disorder." (EH Feb. 21 at 74). Thus, counsel was not ineffective for failing to present psychiatric testimony as mitigating evidence.[20]

Moreover, Reed waived mitigating evidence. Counsel cannot be ineffective for following the wishes of his client. *Wike v. State*, 813 So.2d 12, 18 (Fla. 2002)(rejecting an ineffectiveness

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[19] Reed's huffing gasoline is also a double edged sword. *Tompkins v. Moore*, 193 F.3d 1327, 1338 (11th Cir.1999) (noting that alcohol and drug abuse is a two-edged sword which can harm a capital defendant as easily as it can help him at sentencing); *Clisby v. Alabama*, 26 F.3d 1054, 1056 (11th Cir.1994)(noting that many lawyers justifiably fear introducing evidence of alcohol and drug use); *Rogers v. Zant*, 13 F.3d 384, 388 (11th Cir.1994) (noting reasonableness of a lawyer's fear that defendant's voluntary drug and alcohol use could be "perceived by the jury as aggravating instead of mitigating")

[20] Reed's verbal I.Q. was 83 and his performance I.Q. was 79 which is one point below the low average range. (EH Feb 19 at 71-72). Reed made no claim that his counsel was ineffective for failing to present his I.Q. as mitigating evidence.

claim where counsel's decision was premised upon his client's wishes); *Porter v. State*, 788 So.2d 917, 922 (Fla. 2001)(noting that a defense attorney is not ineffective for following such instructions by counsel's client).

ISSUE XI

DID THE TRIAL COURT PROPERLY SUMMARILY DENY THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILING TO OBJECT TO THE FELONY MURDER AGGRAVATOR? (Restated)

Reed asserts that trial counsel was ineffective for failing to object to the felony murder aggravator jury instruction at the penalty phase to preserve the claim that this aggravator is an automatic aggravator. The State respectfully disagrees. Trial counsel is not ineffective for refusing to object to jury instructions this Court has repeatedly held are proper. Thus, the trial court properly denied this claim of ineffectiveness without an evidentiary hearing.

The trial court's ruling

The trial court summarily denied this ineffectiveness claim.

Procedural Bar

First, this issue should have been raised in the direct appeal and is not properly litigated in post-conviction proceedings. Thus, this issue is procedurally barred. *Thompson v. State*,796 So.2d 511, 514 n.5 (Fla. 2001)(rejecting an automatic aggravator attack on the felony murder aggravator in post-convition litigation as procedurally barred because it should have been raised on direct appeal);*Sireci v. State*, 773 So.2d 34, 39-40 n.9 & n.10 (Fla. 2000)(same).

Merits

Both the Florida Supreme Court and the Eleventh Circuit have held that the felony murder aggravator is not an automatic aggravator. *Francis v. State*, 808 So.2d 110, 136 (Fla. 2001)(rejecting such a claim); *Freeman v. State*, 761 So.2d 1055, 1072 (Fla. 2000)(noting that the Court has repeatedly held that there is no merit to this claim *citing Blanco v. State*, 706 So.2d 7 (Fla.1997); *Banks v. State*, 700 So.2d 363 (Fla.1997) and *Johnson v. State*, 660 So.2d 637 (Fla.1995)). See also *Mills v. Singletary*, 161 F.3d 1273, 1287 (11th Cir. 1998)(finding claim that Florida's felony murder aggravator is automatic "to be meritless" citing *Johnson v. Dugger*, 932 F.2d 1360, 1368-70 (11th Cir.1991) and *Bertolotti v. Dugger*, 883 F.2d 1503, 1527-28 (11th Cir.1989)).

In *Blanco v. State*,706 So.2d 7 (Fla. 1997), the Florida Supreme Court explained that the felony murder aggravator is not automatic because the list of enumerated felonies in the felony murder statute is larger than the list of enumerated felonies in the aggravating circumstance statute. The *Blanco* Court then gave a list of examples. A person can commit felony murder via trafficking, carjacking, aggravated stalking, or unlawful distribution, and yet be ineligible for this particular aggravating circumstance. The Court then held that this scheme thus narrows the class of death-eligible defendants. *Blanco*,706 So.2d at 11.

It is not deficient performance for trial counsel to not object to an aggravator that this Court has repeatedly held is

proper. Nor can Reed establish any prejudice. If trial counsel had objected to the aggravator and appellate counsel had raised a automatic aggravator argument, this Court would have merely rejected the claim once again.

ISSUE XII

DID THE TRIAL COURT PROPERLY FIND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS? (Restated)

Reed asserts his trial counsel was ineffective for failing to object to the prosecutor's comments. Reed objects to the prosecutor's references to the victim as a minister's wife. Reed also argues that counsel should have objected when the prosecutor referred to the defendant as unmarried, the father of illegitimate children who was irresponsible and referred to the victim as a minister's wife who was married for 35 years and who actually lived according to her Christian principles. The State respectfully disagrees. The claim was abandoned. Furthermore, most of the prosecutor's comments were perfectly proper and counsel was not ineffective for not making baseless objections. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

The trial court's ruling

The trial court denied this claim reasoning:

> The defendant's current motion suggests that trial counsel was ineffective for failing to object to the prosecutor's reference to the victim as a minister's wife and the prosecutor's reference to the defendant as the irresponsible father of illegitimate children. Defendant also suggests that it was inappropriate for trial counsel himself refer to the victim's husband as a minister and to

> acknowledge to the jury that the defendant was, in fact, a drifter with children born out of wedlock.
>
> The defendant has offered no evidence on this particular issue, either by way of defendant's own testimony or through cross-examination of trial counsel at the evidentiary hearing. Accordingly, this Court concludes that the defendant has abandoned this particular claim.
>
> However, considering this ground in the light most favorable to the defendant, this Court notes that trial counsel did, in fact, object to the prosecution's reference to the matter of the defendant's irresponsibility and his drug use. (See, pp. 375, 513, and 517, TT). Furthermore, trial counsel's direct reference to the actual facts in the case cannot be said to be ineffective. After all, the jury had to have learned that Reverend Oermann was a minister and his wife, therefore, a minister's wife, by the simple fact of the jury's learning of the way in which the defendant, his significant other, and their illegitimate children were introduced to the Oermanns. Counsel's reference to the status of the victim and her husband did little more than to place the entire situation and the defendant into perspective.
>
> With regard to trial counsel's references to the defendant of which the defendant complains, this court concludes that they were appropriate under the circumstances and that they were in direct response to the prosecutor's closing argument. They were also in furtherance of trial counsel's reasonable doubt argument. (See, generally, pp. 783-789, TT). For example, at one point trial counsel said
>
> "Being a drifter and being a father of illegitimate children and being a vagrant and somebody who is loving off somebody else's good will doesn't make you a rapist and a murderer. Being a thief doesn't necessarily make you a rapist and a murderer." (II.5-9, p. 789, TT).
>
> While this one phase might not place the defendant in the best possible light, it is a comment exactly on the evidence presented at trial and the prosecutor's reference to the same in closing argument. The Court concludes that defendant has failed to establish any deficient performance on the part of trial counsel.

(Order at 19-21).

Abandonment

Reed did not pursue this claim at the evidentiary hearing. Reed did not call trial counsel to the stand and when the State called trial counsel to the stand, post-conviction counsel did

not question counsel as to why he did not object to the prosecutor's comments. Thus, Reed has abandoned this claim.

Merits

Trial counsel did, in fact, object. Defense counsel objected to the testimony regarding Reed's irresponsibility on relevancy grounds and to the testimony regarding Reed's drug use due to its prejudicial value. (XII 375; XII 513, 517). The trial court overruled the first objection and denied the motion for mistrial regarding the second objection finding the evidence relevant to establishing a motive. Counsel cannot be ineffective for failing to make objections that in fact he made.

There is nothing improper about a prosecutor referring to a witness by his proper title. Moreover, in this particular case, the jury would have known that the victim was a minister's wife because the defendant met the victim through Traveler's Aid. It was through this organization that Reed was given shelter in the home of Reverend Oermann, a Lutheran minister and his wife, Betty. So, in this particular case, his profession was relevant to establish how the victim came to know the defendant and why the defendant had been living in their home. The prosecutor referring to the Reverend as a reverend is not error. Trial counsel is not ineffective for failing to make baseless objections to the prosecutor's proper comments.

Reed also asserts that trial counsel was ineffective for failing to object to the prosecutor's argument that the jury should show the defendant the same mercy that the defendant

showed the victim. In the penalty phase, the prosecutor commented: “please do not be swayed by any pity or sympathy for the defendant. What pity or sympathy or mercy did he show Betty Oermann?” (T. 878). There was no objection. While this Court has held that the prosecutor should not argue that the jury should show the same mercy to the defendant as he showed to the victim, these cases were decided after this trial was held in 1986. *Richardson v. State*, 604 So.2d 1107, 1109 (Fla.1992)(finding that the prosecutor committed error in asking the jury to show the defendant as much pity as he showed his victim but finding error harmless beyond any reasonable doubt); *Rhodes v. State*, 547 So.2d 1201, 1206 (Fla.1989)(remanding for a new penalty phase proceeding based on several errors including the prosecutor’s closing argument which was “riddled with improper comments” one of which was that jury show defendant same mercy shown to the victim on the day of her death). It is only deficient performance for counsel to fail to object to prosecutorial comments which have been held to be reversible error at the time of the trial. Nor is there any prejudice. Such a comment, while error, is not sufficient, standing alone, to warrant a mistrial. *Kearse v. State*, 770 So. 2d 1119, 1129-1130 (Fla. 2000)(determining single comment by prosecutor that jury should show the same mercy he showed to Officer Parrish was harmless error).

Reed’s reliance upon *Rachel v. State*, 780 So.2d 192 (Fla. 2d DCA 2001), is misplaced. The Second District in *Rachel* remanded a case for an evidentiary hearing on a claim of ineffectiveness

for failing to object to the prosecutor's comment. The trial court had summarily denied the motion without conducting an evidentiary hearing. The prosecutor in *Rachel* referred to the defendant as a "damn liar" who shed "hypocritical" tears on the stand which was an insult to the victim and her family. The prosecutor also implied that Rachel was not crying immediately following the murder: "When the kill was fresh, when Mrs. Green's blood was still warm ... his attitude, his emotion was not tears. It was hostility. It was defiance. It was anger." The prosecutor ridiculed defense counsel for using "trial techniques" such as putting her hand on Rachel's shoulders during voir dire, thus showing that she was not afraid of him and that he was not a bad guy, calling him by his first name and referring to him as a sixteen-year-old child in an attempt to depict him as a very immature kid. The prosecutor referred to these techniques as "attitude manipulation." The Second District reversed for an evidentiary hearing.

Here, Reed was granted an evidentiary hearing and did not pursue this issue at that hearing. None of the prosecutor's comments in *Rachel* are remotely similar to the prosecutor's comments in this case. Here, the prosecutor did not attack trial counsel in any manner in his comments. Thus, trial counsel was not ineffective for failing to object to the prosecutor's comments. Thus, this claim was abandoned and is meritless.

ISSUE XIII

> DID THE TRIAL COURT PROPERLY FIND NO INEFFECTIVENESS BASED ON CUMULATIVE ERROR? (Restated)

Reed asserts that the cumulative errors of his counsel amount to ineffective assistance of counsel as well. The State respectfully disagrees. There was no ineffectiveness and therefore, no cumulative ineffectiveness. Thus, the trial court properly denied this claim of cumulative ineffectiveness.

The trial court's ruling

The trial court rejected this claim of ineffectiveness by ruling:

> Lastly, the Court notes that it has also considered the cumulative performance of trial counsel, and still concludes that there has been no deficiency established such as would have affected the outcome of the defendant's trial.

(Order at 36).

Merits

In *Brown v. State*, - So.2d -, 28 Fla. L. Weekly S355 (Fla. April 24, 2003), the Florida Supreme Court rejected a cumulative effect of counsel's errors claim. This Court explained that where each of the individual claims of ineffectiveness is insufficient under *Strickland*, a claim for cumulative error fails as well and therefore, denied on the cumulative error claim. *See also Bryan v. State*, 748 So. 2d 1003, 1008 (Fla. 1999)(concluding that defendant's cumulative effect claim was properly denied where individual allegations of error were found to be without merit).

Collateral counsel argues that the trial court used an incorrect standard in adjudicating the cumulative error claim.

The trial court employed the correct standard. The cumulative performance of trial counsel is, indeed, considered in a cumulative error claim. Both prongs of *Strickland* must be met in a cumulative ineffectiveness claim as in a singular ineffectiveness claim.

CONCLUSION

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

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Christopher J. Anderson, Esq., 645 Mayport Road Suite 4-G, Atlantic Beach, FL 32233 this 30th day of June, 2003.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

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

_____
Charmaine M. Millsaps
Attorney for the State of Florida