IN THE SUPREME COURT OF FLORIDA

ANTHONY LAMARCA,

Appellant,

v. CASE NO. SC03-1815

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

_____

AMENDED ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

References in this brief are as follows:

Direct appeal record will be referred to as “T”, followed by the appropriate page number. Post conviction record will be referred to as “R”, followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

The appellant's brief is largely devoid of facts developed during the evidentiary hearing below. Moreover, it contains the argument of counsel, and, cannot be accepted by the State. Consequently, the State adds the following statement of facts relevant to a disposition of the issues raised in this appeal.[1]

A. The Defense Attorneys and Defense Investigator

Appellant was represented at trial by two attorneys, Ron Eide and Nora McClure. Mr. Eide testified that he has been an assistant public defender for twenty-six years and had tried all kinds of cases, including hundreds of first degree murder cases. (R-4, 482). Eide was board certified (R-5, 577) and has frequently attended the life over death seminars. (R-4, 578-79). In fact, he is on the steering committee. (R-5, 579). Eide was the Chief Assistant Public Defender and was head of the Capital Defense or "Cap Team." (R-4, 482). He probably tried a dozen capital cases through the penalty phase and only had one client on death row, Lamarca. (R-4, 482-83).

Mr. Eide noted that the State had a "lot of circumstantial evidence" and direct evidence in the form of Jeremy and Hughes. Hughes testified about Lamarca's flight after the murder and noted that "he left leaving the belong[ings] in the trailer, his

[1]For facts adduced at trial, the State relies upon the facts set forth in this Court's opinion in Lamarca v. State, 785 So. 2d 1209, 1211-1212 (Fla. 2001).

toothbrush, his shaving kit, his shoes." (R-4, 484). Lamarca had been seen with the gun just prior to the murder, attempting to pawn it the day before the murder. (R-4, 485). He noted the defense tried to exclude testimony concerning the rape of Tonya, but was unsuccessful. (R-4, 486).

Eide utilized the services of Bill Braun, an investigator who interviewed Lamarca. Eide and McClure also personally interviewed Lamarca a number of times to assist in his defense. (R-4, 581). Lamarca had the desire to control certain aspects of his defense, demanding that Eide interview certain witnesses and even gave suggestions on how to approach witnesses. (R-4, 582). They discussed whether or not Lamarca would testify during trial early on and Eide tailored his cross-examination of witnesses based upon whether or not Lamarca would testify. (R-4, 582). Lamarca was well aware of the defense strategy and was "well versed in the criminal justice system." (R-4, 583). In fact, Lamarca even provided Eide research on legal matters.

Eide thought he was aware of pending charges on State witness Hughes for burglary in Sarasota. (R-4, 491). Eide did not have any independent recollection of the particular information he possessed at the time of trial. (R-4, 492). Although he did not recall seeing a document relating to felony offender enhancement, Eide thought that he "testified that he

had 11 or 12 felony convictions, so that probably gives away the fact that he could be habitualized." (R-4, 494). He did not recall being aware of any communication between the Pinellas State Attorney's Office and the Charlotte County State Attorney's Office at the time of trial. (R-4, 497). If Eide was aware of any agreement between Hughes and the State Attorney's Office he would have used that information to cross-examine Hughes. (R-4, 498).

Mr. Smith was an important witness for the State. Eide recalled that Smith had been using drugs when Lamarca came in contact with him in the early morning hours carrying a purple Royal Crown bag with coins in it. Lamarca said something about killing his son-in-law or "Kevin." (R-4, 500-501). He recalled Smith had some sort of legal troubles with a violation of probation and he was arrested on that charge. (R-4, 502). Eide thought that Smith was incarcerated at the time he took his deposition. (R-4, 504). Eide was not aware that a Pasco County Detective agreed to write a letter on behalf of Jeremy Smith. (R-4, 506). Nor was Eide aware that Judge Crane went to court and testified at Jeremy Smith's hearing on the 22nd. (R-4, 507). He thought such information would have been useful to cross Jeremy Smith. (R-4, 508). Eide had no information regarding any deal between the State and Jeremy Smith at the time of trial. (R-4, 508).

Eide had information that at some time after his release from prison Lamarca was planning to travel to Washington. (R-4, 510-11). He thought that the State put pressure on Lori Galloway at the time of trial, but he "didn't remember the specifics of it." (R-4, 511). She never testified and Eide did not think the State's pressure on her was "of any importance." (R-4, 512).

Lamarca was arrested in Washington, living in a house with Darren Brown. (R-5, 606). Lamarca married Lori Galloway after he was arrested in Washington, but before he was transported back to Florida for trial. (R-5, 606). They had been jail "pen pals" before he went to Washington. (R-5, 606-07). Eide had a chance to review local police reports and depose Mr. Brown, as well as deposing one of the local officers, Sergeant Anderson, involved in the arrest. (R-5, 608). Brown told Sgt. Anderson of the unusual circumstances surrounding his arrival in Washington. They received a call from Tony's sister and talked to Lori Galloway, saying that Tony had killed a judge and was on his way on a Greyhound Bus. (R-5, 610). Eide asked his investigator Braun to gather information from Mr. Brown and Lori Galloway. (R-5, 610).

Braun interviewed Lori Lamarca and Darren Brown. His report reflected that on one occasion Lamarca was outside cutting wood with Darren and Clinton and was told that "Tony bragged about

killing Kevin." (R-5, 612-13). Eide relied upon Braun and thought his information was accurate enough to make important decisions about the case. (R-5, 613). Although there had been some talk about Lamarca moving to Washington when he got out of prison, clearly this trip was precipitated by the murder of Kevin Flynn and Lamarca's flight from the State according to Lori's statement to Bill Braun. (R-5, 613).

Edie chose not to put Lori Lamarca on because he ran the risk of revealing damaging information through direct or cross-examination or suborning "perjury." (R-5, 618). Eide was aware that Nora McClure had spoken to Lori and that Galloway did not provide Nora the same information that she provided their investigator. That caused an ethical dilemma for the defense team. (R-5, 618-19). Lori Galloway did not in any way assist Eide in rebutting the testimony of Darren Brown. (R-5, 622). Moreover, flight was not, as it turned out, inconsistent with Lamarca's testimony. "The argument that he fled could also be consistent with what he said occurred. In that Tonya told him that she was going to blame it on him -- after killing Kevin. And that he left. So, the flight was not a big deal taken in the context of what he testified to." (R-5, 619). In fact, on cross-examination, Lamarca admitted that he arrived in Washington, "unannounced." (R-5, 625). Eide was aware that Darren Brown allegedly made statements to law enforcement "that

Anthony said that he killed his son-in-law because he was an asshole, shot him in the head." (R-5, 638-39). He also recalled from a deposition that he felt pressured to testify by law enforcement, but that "he equivocated on several points." (R-5, 639). Eide was impeached with a deposition in which Brown asserted that "If I didn't go that there would be a warrant out for my arrest and I would come in and spend my time in jail." (R-5, 639-40). Brown also indicated in the deposition that he was uncomfortable with Lamarca getting out of prison and coming to live with his mother. (R-5, 641).

Brown had a poor memory of the various statements he made and that was one reason that Eide thought they kept the admission Lamarca allegedly made about killing his son-in-law out of evidence. (R-5, 642). Brown eventually said that Lamarca made a more vague statement, that "I shot some asshole in the head." (R-5, 643). Eide thought that admission was not enough to come in as evidence. (R-5, 643). Eide did not bring out that Brown felt pressured to testify because his testimony at trial was limited to the fact Lamarca just suddenly appeared up there. (R-5, 643). Since Lamarca's own trial testimony was that he just arrived up there suddenly, Eide thought it made no sense to cross-examine or impeach Brown on that issue and risk opening the door to more damaging statements. (R-5, 645-46).

Lamarca and his other daughter, Tina, were not talking to

each other at the time of the murder. (R-5, 621). Eide admitted that Tonya was a critical witness in this case. She saw her father with the rifle and Lamarca leave the bar with her husband before the murder. (R-4, 512). When asked if the State had any physical evidence of rape, Eide replied that the State did not have any semen, but they did have saliva on Tonya's breast which was consistent with Lamarca's DNA and "evidence of marks on her neck." (R-4, 513). However, the State did not present that corroborating evidence at trial. (R-4, 513).

Eide recalled Tonya testifying that Lamarca ejaculated on the sheets but that the sheets were sent to FDLE and nothing was found matching Lamarca. (R-4, 514). He thought the State was limited in the evidence it was allowed to present on the rape and therefore did not present the saliva evidence. (R-4, 514-15).

The judge allowed testimony on the rape for a limited purpose. The court would not allow the rape to become a feature of the trial. (R-5, 592-93). Eide thought that cross-examining Tonya on inconsistencies might run the risk of opening the door to allow the State to present additional evidence to rebut the defense and rehabilitate Tonya. (R-5, 593). Such evidence could have included "outcry testimony" with Terry Flynn and Todd Shetterly. (R-5, 593). Todd Shetterly was Tonya's uncle and it was Eide's understanding that after Tonya had been raped in

Hudson, she drove back to Pinellas County and met with him. (R-5, 594). And, she immediately told him that "Daddy raped me." (R-5, 594). Tonya also told Terry Flynn, the victim's stepmother, that "Daddy raped me" at 1:30 or 2:00 in the morning. (R-5, 594).

On the S.A.V.E. exam, Ms. Germain noticed "fresh injuries" to Tonya. (R-5, 594-95). Those injuries included some redness in the vagina and anal area. (R-5, 595). There was also evidence of strangulation around the throat area, consistent with Tonya's testimony that Lamarca grabbed her around the neck, kicked in the door, and dragged her inside. (R-5, 595). So, if Eide put on lack of ejaculation evidence, the State would have the opportunity to go into the entire SAVE exam. (R-5, 595). Eide was also aware that Lamarca was going to testify that he was sleeping and woke up with his pants down and pushed Tonya off of him. Had he crossed Tonya on the S.A.V.E. exam, it would have contradicted Lamarca=s testimony. (R-5, 596). The injuries to the anal, vaginal area and Tonya's throat would have contradicted Lamarca's version. (R-5, 596). The jury most likely would have taken the scientific evidence over the testimony of Lamarca, a convicted felon. (R-5, 598).

Eide argued the lack of corroboration to the jury.[2] (R-4,

[2]Eide was aware that Tonya allegedly made an inconsistent statement regarding whether or not Lamarca ejaculated into the sheets during the SAVE examination. (R-4, 520). He thought

521). He thought the defense and State maintained a balancing act: "I believe the State made objections to us getting into the lack of evidence to support the allegation of sexual assault. And I believe that our response was that we didn't think that they had anything anyway, and so we took the chance. I think the judge even indicated that we had to be careful about opening the door." (R-4, 522-23).

Steve Slack was present when Lamarca was shooting pool and was with Tonya when she came back to the bar looking for her husband. (R-4, 525). Slack said that Tonya was upset and stated that "Tina" had been raped by Lamarca. (R-5, 659). Slack apparently made an inconsistent statement to officer Madden. Officer Madden's report reflects that Tonya told Slack Lamarca raped her. (R-5, 649-50). Eide observed Slack testify during the evidentiary hearing and testified that nothing he heard would alter his decision. (R-11, 1528). Slack had been drinking and testified that Tonya was upset. (R-11, 1528). Moreover, he testified that Lamarca was mad or upset prior to leaving the bar. (R-11, 1528). Eide also had Detective Madden's police report and was aware of inconsistencies between what Slack testified to and what he allegedly told Detective Madden. (R-11, 1529). He thought it likely if he called Slack,

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that crossing her on this point might not have been wise since they chose to cross-examine her on the absence of ejaculant she said was present. (R-4, 520).

the state would call Detective Madden in rebuttal. (R-11, 1529). Slack's value as a witness was not worth the potential damage, in that he was an outcry witness who was intoxicated and whose memory was not "the clearest." (R-11, 1529). Eide recalled taking the deposition of Marie Milges, a forensic scientist or specialist. (R-4, 532). She found gunshot residue in Tonya's car, on the driver's side. (R-4, 534). Tonya had access to the car and drove it on the night Kevin was murdered. (R-4, 534-35). However, Eide did not think the residue testimony would impeach Tonya. Eide explained: "Well, if they found the gunshot residue on the door of the car that he was driving presumably after the time of the shooting of Kevin, then that would be an explanation for him having deposited it on the door and not Tonya." (R-5, 600). "[I]n my opinion, I wouldn't have wasted my last close to put on a witness that could be interpreted their way as well as my way."[3] (R-5, 656).

As for Lamarca's statement of intent to kill Kevin, Eide thought it was inconsistent with the State's theory of the case. (R-4, 538). "I guess it was inconsistent if you're saying the State's theory was that he killed Kevin to facilitate the sexual assault of Tonya." (R-4, 538). He never cross-examined Tonya on the statement Lamarca allegedly made to Hughes regarding the

[3]Tonya drove the car and stopped to call 911 after the rape, she also stopped to arm herself with a gun from an uncle "because it made her feel safer." (R-4, 525).

rape: “Did Kevin rape you.” (R-4, 539-40).

Zaccagnino was allegedly present when Lamarca made the statement to Hughes about wanting to kill his son-in-law. (R-4, 540). Zaccagnino did not overhear the statement Lamarca made to Hughes. (R-5, 629). Eide had little recollection of his thought process six years ago and had no recollection of his conversation with Zaccagnino in a holding cell prior to the November trial. (R-11, 1520). However, in reviewing notes of his interview with Zaccagnino, Eide testified: Zaccagnino did not categorically say “that Anthony could not have said what the snitch said he said because he, one, had hearing difficulties,[4] and two, the conversation allegedly took place out in the yard.” (R-11, 1521). It was his understanding or impression that Zaccagnino could not say he was with them in hearing distance the entire time.[5] (R-11, 1521). Also, the defense was concerned that the location of the conversation, the “prison yard” would be revealed to the jury through his testimony. They had filed a motion in limine to prevent any reference to prison being admitted during Hughes testimony. (R-11, 1521-22). The defense therefore made a strategic decision not to put Zaccagnino on and

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[4]Zaccagnino had been hit in the head and as a result had some hearing difficulties. (R-5, 629).

[5]Zaccagnino also told them that Mr. Hughes had “wronged him personally over some financial matter and that he didn’t like him and didn’t trust him.” (R-4, 543).

lose the right to open and close at the conclusion of the guilt phase: “It wasn’t worth it.” (R-11, 1522).

The rifle was seized from Lamarca’s father’s house, was the murder weapon, and it was linked to Lamarca. (R-5, 589). The shell casings on the floor were consistent with having been fired and ejected by that rifle. Shell casings were found inside Mr. Lamarca’s trailer in Dunedin. (R-5, 589). The rifle was recovered by law enforcement from Joseph Lamarca, Sr.’s residence in Hudson. (R-5, 589). After talking to Joe Lamarca, Sr. and Angela Lamarca, Eide became aware that Lamarca’s access to the home was limited. (R-5, 589). In other words, Lamarca’s claim to have a key to the house was not true. (R-5, 580). While Lamarca may have had some access to the house, the father told him “he didn’t have a key.” (R-11, 1550). Moreover, the rifle was seized after Lamarca, Sr. provided the Pasco Sheriff’s Office consent to search. (R-5, 580). Through legal research, Eide concluded that Lamarca did not have legal standing to suppress the rifle. (R-5, 580). Eide was ethically bound not to file a frivolous motion, even if his client demanded it. (R-5, 580, 591). Eide did not talk to Lamarca’s brother Joseph, who purportedly had mental problems. Eide recalled hearing that Lamarca beat up Joseph for having made sexual advances toward one of the girls. (R-4, 544).

When the defense announced it was ready for trial, they were

in fact ready to proceed. They had taken all of the depositions of material witnesses and had sufficient time to discuss the case with Lamarca and develop a strategy. (R-11, 1522-23). Eide had filed all the motions he thought were appropriate and discussed the reasons for not filing a motion to suppress the rifle with Lamarca. Lamarca seemed to agree with this after the standing issue was explained to him. It was based upon what his father and sister had testified to in deposition. (R-11, 1523).

Eide was sitting next to Lamarca when Tonya testified about the Pasco County rape. (R-11, 1524). During her testimony and immediately after it Eide did not observe any change in Lamarca's demeanor. (R-11, 1524-25). Eide did not recall any outburst or other sign that he was emotionally reacting to her testimony. (R-11, 1525). Prior to Tonya's trial testimony, Lamarca was aware of the rape allegation and Eide had discussed the issue with him. (R-11, 1525). Eide was aware that Dr. Maher found Lamarca competent to proceed. (R-11, 1525-26). There was nothing prior to Tonya's testimony or after it which led Eide to believe Lamarca was not competent. After Tonya testified, Lamarca continued to reasonably and rationally discuss the case with him and Ms. McClure. (R-11, 1527).

Eide testified that Nora McClure was primarily responsible for the penalty phase. He was aware that Nora had talked with

Dr. Caddy. (R-4, 552). Eide was not sure when he first learned that Lamarca wished to waive mitigation during the penalty phase, but by August he knew that was Lamarca's intention. (R-4, 553). They probably knew that earlier because Lamarca expressed his intention not to be subjected to prison for "20 years or so." (R-4, 553). Eide admitted he did not seek a competency hearing, testifying that they already had a confidential mental health expert who had examined Lamarca and Dr. Merin, who said he was competent. (R-4, 554). He was not aware when Dr. Caddy became involved, but that Lamarca had mentioned to Nora that he would be willing to speak with Dr. Caddy. (R-4, 554).

The State called Nora McClure, who testified that she has been an Assistant Public Defender for 22 years. She was a Division Director in charge of three felony divisions and member of the "Cap Team." She had been a member of the Cap Team, a group of attorneys who conduct first degree murder trials, for 19 or 20 years. (R-8, 1143). She attended death penalty sentencing seminars every year or every other year. (R-1144). During her time with the Cap Team she had eight or nine cases which went through to the penalty phase. (R-8, 1145). Ms. McClure is board certified in criminal trial work. (R-8, 1148).

Lamarca was the only client she has dealt with who prevented the defense from putting on mitigation evidence. (R-8, 1146).

The first time she learned Lamarca did not want any mitigation presented was in March of 1996. Regardless of Lamarca's desires, she continued her preparation for the penalty phase the same as she would for any client facing the death penalty. (R-8, 1146-47). As part of standard practice, they retained psychiatrist Michael Maher, an M.D., located in Tampa. (R-8, 1147). She was familiar with Dr. Maher, having used him many times in the past. (R-8, 1147). Dr. Maher conducted a clinical psychiatric interview of Lamarca on "6/11/97." (R-9, 1308). Dr. Maher provided some useful information for the penalty phase, stating that Mr. Lamarca suffered from PTSD and that he "could probably get us the non-statutory mitigators." (R-8, 1153).

Dr. Maher could not say that the statutory mental mitigators applied and noted that it would be difficult to present mitigation because at that time, Lamarca was still denying involvement in the crime. (R-8, 1153). Ms. McClure agreed that the mental mitigators presuppose an admission of culpability so that you attempt to explain why a crime occurred. (R-8, 1153). Dr. Maher thought Lamarca was stable and not incompetent to proceed. (R-8, 1159). Dr. Maher told Ms. McClure that Lamarca "knows how the system works, will roll the dice, would never admit to anything." (R-8, 1162). Dr. Maher thought that Lamarca was "slick" and "potentially dangerous." (R-8, 1163).

Dr. Maher told Ms. McClure that he "has not met anyone angrier or inclined to violence to solve problems." (R-8, 1163-64).

She did not think that Dr. Maher talked to family members of Lamarca. "Some of our experts do that automatically. Some of them do not unless we request it." (R-9, 1305-06). While they generally want an expert to talk to family members, Ms. McClure noted that in Lamarca's case, "[w]e didn't have any cooperating family members." (R-9, 1306). She rejected collateral counsel's suggestion that they only attempted to contact family members 30 days before the trial. "We wrote to them. We tried. I'm sure Bill either called them or went by there, but they were not going to participate because Tony had asked them not to." (R-9, 1307).

Ms. McClure told Lamarca that "Dr. Maher, was concerned that the defendant had threatened people, guards, and he said they weren't threats, they were promises. He [Lamarca] said good, don't call him. He said I should talk to Dr. Caddy." (R-8, 1185). McClure's notes also reflect that Lamarca had not changed his mind about the penalty phase. Lamarca asked his family to respect his wishes and not to cooperate with the defense. The prospect of life in prison tormented him, that he liked us [the defense lawyers] but that he still didn't want life in prison. (R-8, 1156-57).

From March of 1996 until September 1997 Lamarca's stance was

the same: He did not want a penalty phase and would not allow "us to present witnesses or testimony on his behalf." (R-8, 1158). The defense nonetheless continued to talk to Lamarca about the penalty phase and attempted to locate and interview family members. (R-8, 1158). In August 1997, Lamarca told McClure that a penalty phase would be a waste of time, that he wants the death penalty, "that he did it and he'll do it again." (R-8, 1180). Lamarca's desire not to put on mitigation was consistent from March 1996 and the time Tonya Flynn testified. (R-8, 1188).

On October 20, 1997, Ms. McClure again sought permission from Lamarca to interview his family and put on testimony. (R-8, 1185). Lamarca did not want either his sister or his father at trial and would not want either one of them to testify during the penalty phase. (R-8, 1180). She explained that she had to prepare for the penalty phase even if he says he did not want her to.[6] Lamarca told her he did not want the defense to argue

[6]Ms. McClure's file reflects letters documenting her attempts to obtain mitigation information. Letters were sent to Lamarca's dad, another potential witness, Martin Edwards, Lori Lamarca, and Angela. The first letter was sent in March of 1996, others were sent in July through October of 1997. (R-9, 1285). The letter sent to Angela Lamarca in November of 1997, reflected that "I have made repeated attempts contact your father and I believe you at the residence in Hudson, and none of the phone calls have ever been returned. Therefore, I am sending this letter along with my plea to please consider assisting me in saving your brother's life." (R-9, 1286-87). That letter was one last ditch effort to get her and her father to come in. (R-9, 1287).

for any lesser included offense. (R-8, 1181). Ms. McClure talked to Lori Lamarca, but Lamarca had made it clear to her that she "wasn't going to cooperate with us." (R-8, 1188). Lori told Ms. McClure that she was going to honor Lamarca's wishes. (R-8, 1190).

McClure contacted Lamarca's father but did not recall any attempts to contact Lamarca's brother, Joseph Lamarca, Jr. (R-8, 1190). Lamarca had told the defense team that his brother was mentally ill, that he had killed people, pled insanity, and been hospitalized. (R-8, 1190). Ms. McClure testified: "Lori talked to us. I think her son did as well, provided information, but they wouldn't come if he didn't want us to. Other family members like Angela and his dad wouldn't give us anything." (R-8, 1191). Angela Lamarca was contacted and refused to cooperate in any way. (R-8, 1195). Mark Brown was talked to and ready to testify in the penalty phase if he had been allowed to. (R-8, 1197).

When Ms. McClure, against Lamarca's wishes, actually brought two family members to the court room, Lamarca became angry. McClure testified: "...[H]e was furious at me because I had dragged his father and his sister to the courtroom during his trial in an attempt to get them to convince him to let them testify in the second phase. And he told me that I had made a

big mistake in doing that, and he cracked his head against the window. He was livid, not bazaar (sic)." (R-9, 1325).

McClure never personally met Dr. Caddy but wrote to him in July of 1997. (R-8, 1148). She asked for the records he possessed on Lamarca relating to the civil suit. (R-9, 1295). Her first phone conversation with him was in October or November of the same year. (R-8, 1148).

In November of 1997, Lamarca indicated that he did not want Dr. Caddy to testify on his behalf. (R-8, 1151). At some point, however, Lamarca indicated he would like to speak with Dr. Caddy. (R-8, 1152). She retained Dr. Caddy as a confidential expert to see Lamarca. After that visit, she had a telephone conversation with Dr. Caddy. (R-8, 1164). During that conversation she took notes so that she could remember and document what they had discussed. (R-8, 1165).

McClure's notes were made contemporaneously with her conversation with Dr. Caddy. (R-8, 1166). After her conversation, she typed up the handwritten notes. Ms. McClure testified that the notes accurately reflected the conversation she had with Dr. Caddy on November 16th. (R-8, 1167). [Ex. 19].

Ms. McClure testified that Lamarca told Dr. Caddy about the circumstances of Kevin Flynn's murder. (R-8, 1168). Dr. Caddy told her that Lamarca admitted shooting, "as he thought he would." (R-8, 1168). Lamarca asked Tonya to use the car,

claiming he needed the car to move his belongings. Tonya was obnoxious and refused to let him use the car. Lamarca was upset, and got a ride home from the victim. (R-8, 1170). Lamarca said he had a good relationship with Kevin but when he asked Kevin for the car, he told Lamarca they would have to ask Tonya tomorrow. (R-8, 1170-71). "Tonya had already annoyed him and denied him the use of the car. Tony was upset, intolerant, and he reached around behind himself. He said he was going to 'take a car', but not theirs." (R-8, 1171). Dr. Caddy told Ms. McClure:

> ...He was picking up the gun for the purpose of leaving when Kevin said probably in jest, "What are you going to do, shoot me?" Without any thought, Tony said, Yeah, and shoots him in the head from across the room. Tony claims he instantly recognized what he had done. He goes over to the victim and realizes he's dying. (R-8, 1171)

Lamarca claimed he felt "sad" and that while Kevin was on the floor "gurgling" he put a "second bullet in his head to put him out of his misery." (R-8, 1171).

Dr. Caddy thought Lamarca acted consistent with Post Traumatic Stress Syndrome [PTSD], to "instantly react" to events. (R-8, 1171). Ms. McClure thought that Dr. Caddy provided enough information, given Lamarca's admission to the offense and PTSD to potentially submit a statutory [mental] mitigating circumstance to a jury. (R-8, 1172). However, Dr. Caddy possessed a "moral dilemma, if you will, from taking a

confession from Tony Lamarca." (R-9, 1330). Ms. McClure testified: "Dr. Caddy began by telling me that he had this moral or ethical problem or that there was some -- it was unclear to me what he was talking about I think initially. But he said he wasn't sure what role he was going to be able to play in the penalty phase after having talked to Tony Lamarca and he told me that Tony had admitted to the shooting as he thought he would." (R-11, 1495).

"Dr. Caddy felt that even though Tony had admitted to the crime to him that he would never have to reveal that even if we called him to testify in the hearing. And I relayed to Dr. Caddy at some point during this conversation that that wasn't the case. If he was going to be called to testify, it was going to come out that Tony had admitted the crime to him." (R-11, 1495-96). Indeed, McClure's notes reflect his concern the prosecutor would ask him about what Lamarca told him: "Caddy asked, and I quote, Do you think the prosecutors will get into that, close quote. And I replied that they most certainly would and that Tony's statements about his involvement in the shooting would probably be a focus of their theory and arguments to the jury. Caddy still seemed surprised that the statement from Tony might not remain confidential." (R-11, 1502). She got the impression from Dr. Caddy that he led Lamarca to believe that "if he confessed to him or told him what really happened that it

would never come out." (R-11, 1503).

Lamarca apparently implicated himself in another murder during his interview with Dr. Caddy. When questioned about that, Ms. McClure testified that she did not have to turn that information over to the state. "I only have to report someone reporting to kill in the future. If my client tells me he's killed someone else, that's confidential." (R-9, 1340).

Ms. McClure did not observe any problem with Lamarca's thought processes, she thought he was "really intelligent," "articulate," sometimes "clever" and sometimes "profane" and "angry" but never suspected there were mental health problems. (R-8, 1199-1200). He had command of the facts of his case and the capacity to relate them in an organized fashion. (R-8, 1200). Nothing she learned during her representation caused her to believe she needed a second opinion on the issue of competency. (R-8, 1200-01). During trial, nothing led her to believe that Lamarca did not understand the nature of the proceedings or the ramifications of being found guilty. (R-8, 1201). She never had a problem communicating with Mr. Lamarca. (R-8, 1201). He did not have a problem understanding the nature of the process, her role, the judge's role, or the prosecutor's role. (R-8, 1201-02). She did not observe any evidence of bizarre thinking. (R-8, 1203).

Lamarca made notes regarding Tonya's deposition suggesting

how the defense could effectively cross-examine her. (R-8, 1204). Lamarca also provided notes to the defense after reviewing the deposition of his daughter, Tonya. (R-8, 1205). The defense file reflects notes of what Lamarca indicated he wanted to say in penalty phase. (R-8, 1208). Based upon her observations, Ms. McClure believed Lamarca was competent to take the stand in his own defense and waive penalty phase mitigation. (R-8, 1217).

Investigator Braun informed Lamarca that Lori [Lamarca] "claimed the Defendant bragged to her son and to 'King' about the killing." (R-8, 1211). McClure also talked to Lori Galloway on September 24th and had reviewed her investigators report. Lori presented an ethical dilemma because she provided the defense with two different statements. (R-8, 1214). Ms. McClure could not present Lori as a witness to impeach Brown because she had provided different stories. (R-8, 1215).

Public Defender Investigator William Braun testified that he was assigned to help the defense team in the Lamarca case. (R-6, 760-61). He reviewed his notes from an interview with Angela Lamarca, sister of the defendant. (R-6, 764).

Angela stated that she had observed Lamarca with coins in a bag. (R-6, 771). Braun's report indicates that Lamarca's father allowed a search of the house, "reluctantly." (R-6, 772). She felt that he would feel intimidated or compelled to

allow the search. (R-6, 772). On cross-examination, Braun acknowledged that Lamarca, Sr., was deposed by trial counsel Eide and provided sworn testimony regarding the police presence at his house. (R-6, 774).

B. Attorneys Testifying On The Brady/Giglio Claim

John Burns testified that he was an Assistant State Attorney in the 20th Judicial Circuit, Charlotte County. (R-5, 654). He handled the case of James Hughes and acknowledged that he e-mailed the state attorney to see if he could treat him as a habitual felony offender. (R-5, 669-70). He did not have a copy of his e-mails sent under the old computer system and it was his understanding that the e-mails were not preserved.[7] (R-5, 670).

He reviewed the Hughes file and testified that he handled the case from approximately November of 1997 to its final disposition on January 30th. (R-5, 673). He was aware that Hughes was a witness in a homicide case. (R-5, 673). After reviewing Hughes score sheet, Burns testified that he scored in the prison range of 40.5 months to 67.5 "as the midpoint." (R-5, 674). Burns did not recall talking to anyone in the Pinellas

[7]Burns was not sure what the policy on e-mails was in 1997, but that they now preserve the e-mail record. (R-5, 671). Mr. Burns removed his progress notes before turning information over to CCRC because of a determination from supervisors in the state attorney's office that progress notes are work product and therefore are exempt from public records' disclosure. (R-5, 678).

County State Attorney's Office regarding Mr. Hughes' case. (R-5, 674). He did write an internal note to the file questioning Hughes' cooperation in the murder case. (R-5, 675). Hughes ultimately received a downward departure sentence of 36 months. (R-5, 676, 680). The reason for the downward departure was his cooperation given to the state. (R-5, 676).

The first time his office opened Hughes case was August 5th, 1997. (R-5, 680). The State Attorney's Office, through Assistant Paul Poland, made a plea offer communicated to Mr. Cooper of the Public Defender's Office on September 2, 1997. (R-5, 681). At that point he realized that Hughes was in Pinellas County, in the middle of trial. (R-5, 683). A note in the file reflects that Burns was informed that Hughes had been cooperating in the murder case and posed a question, internally, regarding his cooperation. (R-5, 684). The file reflects that Mr. Kershey of the state attorney's office spoke to Mr. Crane. The note stated: "Spoke to Shawn Crane at Pinellas SAO, Defendant did testify against Anthony Lamarca even though ASA gave him no promises at all?" (R-5, 684-85). In November and December [when Lamarca was tried] Mr. Cooper was still attempting to negotiate on behalf of Mr. Hughes, and, used his cooperation in the murder case in an effort to gain a more favorable deal. (R-5, 685). Mr. Burns was not aware of anyone from the Sixth Circuit State Attorney's Office contacting either

him or his office seeking lenient treatment or consideration for Hughes. (R-5, 685). If he had received such a request, he would have memorialized it in the file. (R-5, 685). In fact, he would require such a request to be sent on official letterhead. (R-5, 685-86). He never received such correspondence in this case. (R-5, 686).

In 1997 the state attorney=s office had an internal policy on habitualization. They were using FPAA guidelines and if a defendant did not meet the internal guidelines, the office did not seek a habitual offender sentence. (R-5, 687-88). If someone like Hughes did not meet the internal guidelines, they could habitualize the individual, but only if the prosecutor received permission directly from the State Attorney, Mr. Delassandro. (R-5, 688, 700). After e-mailing Mr. Delassandro directly for such permission, Burns was contacted by ASA Fordham, a senior assistant, who replied that absent a written agreement from the Pinellas County SAO, the defendant would have to plead to the original offer, "42 months DOC."[8] (R-5, 690).

The Sixth Circuit State Attorney's Office had no discussions, request, or input on the negotiations. On December 30, 1997, the offer on the table was 42 months. (R-5, 692). Mr. Hughes was vacillating on accepting the offer, he was

[8]Burns observed that an attorney new to the felony division should not have e-mailed the elected State Attorney. (R-5, 699).

concerned for his safety at the Central Florida Reception Center. (R-5, 693). The original plea offer of 42 months dropped to 36 based upon continuing negotiations with Mr. Cooper. Cooper stated that his client didn't want to do 42 months, and Hughes thought, knowing Mr. Cooper, that he asked for 24 months and that 36 months was a counter offer. (R-5, 694). At no point was Burns acting as an agent of the Pinellas County SAO's office and did not act under their direction. Indeed, Burns again stated that he did not "believe I ever spoke to anyone personally from the Sixth Circuit." (R-5, 694). ASA Kershey noted the substantial cooperation in the file and agreed to 36 months. (R-5, 695).

Sonny Im testified that he is a County Court Judge and that he represented Jeremy Smith. He was appointed to the case in March of 1996. (R-5, 706). Judge Im recalled that Smith had given some testimony or a statement on a murder case in Pinellas County. (R-5, 709). Prior to his appointment, Smith had already provided a statement to Detective Tillia. (R-5, 721). Judge Im reviewed a note from the file and surmised that he was asking Detective Tillia to write a letter to confirm Smith's cooperation in the murder case. (R-5, 710). Tillia called Judge Im back and told him he needed to talk to Sean Crane. (R-5, 710). Judge Im called Shawn Crane and was told he was going to look into it. (R-5, 711). Judge Crane stated that he would

not write a letter but he would make a statement at sentencing. Judge Crane agreed to say "that my client cooperated, that there was no promises made, and in return for his cooperation, that they'll clearly state on the record that there was no deal." (R-5, 712). Judge Im elaborated: "...[T]hat there was no nod, no wink. That there was no deal. That they would testify in front of Judge Volanti (sic) that my client gave a statement voluntarily and cooperated with them." (R-5, 712).

On March 22nd, the hearing date, both Detective Tillia and Shawn Crane appeared at the sentencing and said exactly that. (R-5, 713). The prosecutor, Hakitis (sic), objected to the departure sentence and the case was continued. (R-5, 721-22). Judge Im testified that he was pushing for a departure sentence. (R-5, 713-14). He knew that Judge Vilanti would consider Smith's cooperation and thought he had a good chance for a downward departure. (R-5, 716).

Smith indicated he could live with a sentence somewhere around 29 to 30 months. Judge Im testified that there was no agreement with Mr. Crane or Detective Tillia regarding disposition of Smith's case. (R-5, 725-26). And, in fact, the record of the March 22nd hearing made that very clear, stating in court that no agreement existed between the State and Smith: "There's no deals." [quoting Judge Crane from the transcript] (R-5, 726). On March 22nd, the offer was 29 months which was the

sentence Smith ultimately received when he entered his plea on April 16, 1996. (R-5, 728).

Assistant State Attorney Glen Martin testified that he called Jeremy Smith as a witness in November of 1997. He had already done his 29 months by the time he testified. (R-5, 729). Martin was aware from a report by Detective Tillia that Smith was reluctant to return to Florida for the trial. (R-7, 892-93). Martin did not recall seeing a message in the file from Smith's mother, stating he wouldn't testify unless he received full immunity. (R-7, 884). Nor did he recall speaking to Smith's mother either on the phone or in person. (R-7, 885). Martin stated that although he was made aware through post-conviction proceedings that Judge Crane spoke on Smith's behalf, Martin did not have any recollection of knowing that at the time of trial. (R-7, 886). Martin was not aware of any obligation to turn such information over to the defense. (R-7, 887). However, Mr. Martin noted that Smith's deposition revealed that he hoped someone would speak on his behalf: "That's clearly what Mr. Smith said in his deposition to Mr. Eide, that law enforcement indicated that they would tell somebody that he cooperated. I believe that's clearly in the deposition that Mr. Eide took." (R-7, 887). Martin stated that he "[a]bsolutely never made him a promise." (R-7, 887). Martin also testified that he never had any contact with Smith while his case was

pending in Pasco County.[9] (R-7, 889).

Regarding Lamarca's statement of intent to kill his son-in-law because he raped Tonya, Mr. Martin was aware that Tonya denied she had been raped by her husband. (R-7, 903). However, he did believe those words were actually spoken by Lamarca and he had no indication otherwise. (R-7, 903).

Martin believed testimony regarding Lamarca kicking the door in to the Pasco house was accurate. (R-7, 904). Martin knew that two doors were broken in the house. (R-7, 906). While he acknowledged that a report from Detective Ferguson stated that the front door was not broken, Martin testified: "I'm aware of that and I'm also aware of the photographs and the video that showed that it was, which was also turned over to the defense." (R-7, 908). He had no information to suggest the doors were broken by the police and testified: "They were consistent with the doors that Tonya described as being broken at the time that Mr. Lamarca assaulted her, took her into the house at knife point, drug her through the house and went into the bedroom." (R-7, 908).

Mr. Martin acknowledged the defense filed a motion in limine to exclude all criminal conduct which occurred in the Hudson residence, the assault, the burglary, and the rape, all of which

[9]Mr. Martin testified that he was unaware of any communication between the Sixth Circuit and the Twentieth Circuit regarding Mr. Hughes in 1997. (R-7, 899).

occurred at the same time. (R-7, 909). The State was only allowed to comment and present evidence on a limited portion of Lamarca's conduct, the rape, to show presence at the Hudson home and possession of the rifle near the time the victim was murdered. (R-7, 909).

Mr. Martin was aware that Lamarca had made plans while in prison to visit or move to Washington. (R-7, 910-11). Mr. Martin denied threatening Darren Brown if he didn't come to testify. Mr. Martin acknowledged that Brown was a reluctant witness and "more than likely the witness extradition procedure was explained to him. I don't recall any threat." (R-7, 911). Neither he nor anyone from his office threatened Darren Brown. (R-7, 912).

Mr. Martin acknowledged some discussion of marital privilege, noting that Lamarca and Lori Galloway/Lamarca were "prison pen pals" and that Lamarca married Lori after his arrest in Washington. (R-7, 914). But, after she moved back down to Florida, Martin believed that they had divorced. (R-7, 914). Martin denied that he threatened Lori Galloway in order to change or influence her testimony. (R-7, 916-17). A phone call Martin made to Lori Galloway was not made to explain or even discuss the marital privilege. It was made to determine whether or not she received a phone call from Angela regarding Lamarca being wanted for murder and whether or not she passed this

information on to Darren Brown. (R-7, 917-18). Mr. Martin denied that he ever threatened Lori Galloway with arrest or prosecution if she failed to testify against Mr. Lamarca. (R-7, 918).

Mr. Martin did not recall telling Ms. Galloway of the results of any DNA test but that if he did, he would have accurately reported those results. (R-7, 919). However, it was not his practice to discuss DNA results with any witness and he had no recollection of discussing DNA results with Lamarca's father. (R-7, 920).

Mr. Martin testified that he presented copies of the judgments and sentences for Lamarca's prior violent felony convictions for attempted sexual battery with a knife and kidnapping with a knife. (R-7, 922). Mr. Martin denied that the judgment was erroneous or had been vacated. Mr. Martin explained: "No, sir, they came back with guilty as charged. The Court sent it back because his sentence could not be enhanced with a deadly weapon because there was not a specific check mark on the verdict form, but the verdict form clearly said, guilty as charged. The information is charging kidnapping with a knife, and the sexual battery with a knife." (R-7, 925). The opinion states that for sentencing purposes, the sentence could not be enhanced, but the fact Lamarca was found guilty of kidnapping and sexual battery "with a knife" was not altered.

(R-7, 925).

Shawn Crane testified that he was currently a county court judge in Pinellas County. (R-6, 798). Prior to that, he had been employed as an assistant state attorney in Pinellas County for 18 years. (R-6, 799). He prosecuted the Lamarca case along with Glenn Martin. Judge Crane did not promise any witness anything in exchange for their testimony against Lamarca. (R-6, 806). Judge Crane was aware that Jeremy Smith had some charges pending in Pasco County. (R-6, 807). He thought the charge was burglary or violation of probation, but was not certain. (R-6, 808). At some point he was contacted by Judge Im, who was a criminal defense lawyer in Pasco County. (R-6, 808). Judge Im asked him to appear in Pasco County for a hearing and tell the sentencing judge that Smith cooperated in the Lamarca case: "That he cooperated with no agreement for any consideration, correct." (R-6, 810). He had no recollection of Smith's mother calling and telling him that Smith did not want to testify. (R-6, 818).

As for witness Hughes, Judge Crane testified that no promises were made to him in exchange for his testimony. (R-6 820). At some point Judge Crane became aware that Hughes was facing some charges in Charlotte County. (R-6, 826). At a deposition, Hughes indicated that he was hoping to get a benefit from testifying, the low end of the guidelines, and, that they

had already offered him 42 months. (R-6, 828). Again, Judge Crane maintained that there was no deal or agreement with Hughes. (R-6, 829). Judge Crane reiterated that there were no deals between him and anyone in this case. (R-6, 842). Judge Crane recalled that he talked to someone regarding Hughes, relaying information in a general sense, but could not exactly recount the conversation. (R-6, 845). However, he would have relayed the fact that there were no deals. (R-6, 845).

C. Forensic Witness

Suzanne Livingston, Forensic Services Director for the Florida Department of Law Enforcement, testified that she was a serologist and DNA analyst. (R-3, 416-20). She was asked to conduct DNA analysis in this case on items from a SAVE Kit. (R-3, 427). Ms. Livingston examined panties and bed sheets but did not find DNA from semen matching Lamarca's DNA profile. (PCR-3, 429). She found no semen of the two sheets submitted to her for analysis. (R-3, 430). She also conducted a presumptive saliva test on two swabs, one coming from the face and one from the breast of Tonya Flynn. (R-3, 431). The swabs indicated the presence of saliva and they were submitted for DNA testing. The swab from Tonya's face contained genetic markers consistent with Tonya Flynn. (R-3, 432). The second swab, from Tonya's breast, revealed a DNA mixture. (R-3, 433). The results revealed a mixture consistent with a mixture of Tonya's and Lamarca's DNA,

but that Kevin Flynn and "Jasmine" Flynn were eliminated as possible donors. (R-3, 433-34). Assuming that one contributor to the mixture was Tonya Flynn, the possibility of finding another contributor to the mixture in the Caucasian population would be "approximately one in 390." (R-3, 435).

D. Lay Witnesses

James Zaccagnino, Lori Galloway, Steve Slack, and Joseph Lamarca, Jr., testified during the evidentiary hearing below. Due to page limitations on this answer brief, relevant facts from their testimony will be discussed in the argument, *infra*.

E. Mental Health Experts[10]

Dr. Glenn Caddy testified that he was a clinical and forensic psychologist with an office in Fort Lauderdale, Florida. (R-8, 1030). Dr. Caddy has testified in about a hundred capital cases dealing with issues of sanity, competency, and mitigation "style testimony." (R-8, 1038). "Eventually all of the cases in which I've testified have been, in the criminal arena have been for the defense." (R-8, 1038).

Dr. Caddy has examined Lamarca on a number of occasions. (R-8, 1040). His first contact was in 1984 when he was hired by a legal team as part of a class action law suit brought against the Department of Corrections for the failure to protect inmates from violence at the Belle Glade Correctional Institute. (R-8,

[10]Licensed social worker Shirley Furtick testified below regarding Lamarca's social history background. (R-7, 936-1019).

1041, 42). Dr. Caddy concluded that Lamarca suffered substantial abuse at the hands of a number of very powerful and violent people. (R- 8, 1043). While he had been physically and emotionally abused, "he was one of the few inmates I examined who actually reported that he had never been physically raped." (R-8, 1043). He had been beaten but he had confined himself in protective environments and befriended several people who were powerful. (R-8, 1043-44). Dr. Caddy testified that Belle Glade was "a lawless prison" where there was random drug abuse, guards were paid off to allow drugs into prison, and that pornographic videos were made available to the inmates. (R-8, 1044). Average to slender built white males would be raped by powerful groups of black males. (R-8, 1044). Exposure to such stress led to a Post Traumatic Stress Disorder and he learned coping mechanisms to try to deal with prison brutality. (R-8, 1047).

After the federal lawsuit, Dr. Caddy had no contact with Lamarca until 1993 or so when he received a phone call from him. He told Dr. Caddy that he thought he was a fair shooter, about the only one he ever trusted, and that he thought he was going to lose it. Lamarca told Dr. Caddy another inmate had been pushing him and that "if they don't's get him away from me, I'm going to kill him." (R-8, 1048-49). Lamarca had a coping system and that if he was pushed: "[H]is instinct, had almost taken on a reactive instinct of quality it was so intense, that if you

messed with him and he reacted, he would truly and gravely hurt somebody and seek to kill them with his hands. And not on the third or fourth hit, but within several strikes." (R-8, 1049). Dr. Caddy explained that Lamarca had learned a great deal from a man in prison who was an experienced marital artist. (R-8, 1049). By 1994, Lamarca had developed into a more powerfully institutionalized person, "when I had given testimony in 1996 I made it very clear to the Court then that Anthony had the potential to be fatally dangerous to somebody." (R-8, 1050-51).

Dr. Caddy was contacted by the FBI in 1994 and asked about whether or not Lamarca was likely to be seeking to kill Mr. Hanlon or Mr. Littner, his attorneys in the federal lawsuit. Dr. Caddy gave them a sense of how dangerous Lamarca might be, but did not know why Lamarca would target his attorneys, although he stated, "I did know that Anthony Lamarca has had a very difficult relationship with his attorneys." (R-8, 1051-52). Dr. Caddy also thought that Lamarca had difficult relationships "with other people who he perceives to not honor or respect him." (R-8, 1052).

PTSD affected Lamarca in terms of his ability to trust. Lamarca trusts virtually no one. (R-8, 1055). Lamarca will assume that attorneys are dishonorable "ass holes, and only interested in playing the game with him being the latest victim." (R-8, 1055). If they give him any reason not to trust

them, or if he gets a feeling they don't care or "don't care enough" his reaction is to treat them with absolute disregard. (R-8, 1056). At a point when Lamarca feels threatened, he will not wait, Lamarca's thought is to take them out now so that you can protect yourself. "And as a result over the last number of years in prison, actually he's had a relatively safe prison life because he's built a reputation of being so dangerous that even the guards give him wide berth." (R-8, 1057).

Dr. Cady received a call in October of 1997 by Nora McClure who was representing Lamarca in a capital case. He was advised by Ms. McClure that Lamarca had been convicted of first degree murder and that Lamarca refused to allow them to develop mitigation on his behalf and she felt he was being very difficult to represent. (R-8, 1058-59). Ms. McClure told him that Lamarca agreed to see him but that he wasn't interested in presenting any mitigation. Dr. Caddy thought it was rather late for an attorney in a capital case to contact an expert and in his opinion, reflected a failure of the attorney to understand the role of the forensic mental health expert. (R-8, 1059-60). He thought defense attorneys and attorneys in general routinely call on experts in an emergency type situation which and he was concerned about the way defense attorneys practiced their profession. (R-8, 1062).

Lamarca's defense attorneys wanted Dr. Caddy to examine

Lamarca in the context of hoping he would change his mind and allow them to stay on his case and present penalty phase testimony, or gain some insight so that some relevant penalty phase testimony might be proffered. (R-8, 1062-63). He was asked to provide the attorneys with any information he possessed on mitigation. (R-8, 1064).

With regard to his visit with Lamarca in 1997, Dr. Caddy testified that it was a social call, "because he was not really going to allow any meaningful expert review of his circumstances." (R-8, 1066). From his conversation with Lamarca, it was apparent his relationship with his attorneys had soured to the point that he didn't "wish their ongoing involvement." (R-8, 1066). He talked about events leading up to the murder and about contemplating "suicide by putting a .22 caliber into his mouth." (R-8, 1068). He talked about being really upset that Tonya would have made the statement that he sexually assaulted or raped her. (R-8, 1069).

Dr. Caddy thought that Lamarca deteriorated during trial, that he had taken total control at the time he talked with Dr. Caddy, and he wanted to assume the role as his own attorney and basically make a closing argument. And, of course, the record shows that Lamarca did indeed make a closing "in essence telling the Court and the jury pretty much what he thought of them, somewhat articulately, but that's about where it ended." (R-8,

1069-70). Dr. Caddy thought it was the reflection in a narcissistic way of a powerful ego but in reality was a reflection of how inadequate he really feels and he was using the only amount of power he can utilize to control the process because he didn't have control of anything else. (R-8, 1070-71). Mr. Lamarca didn't want to die then or now, but he felt that was his only way to exert his sense of "strength and ego." (R-8, 1071-72).

When Dr. Caddy interviewed Lamarca in May of 2002, Lamarca was having "a series of conflicts with I believe two other attorneys" and had fired that attorney or that attorney was trying to avoid being fired. "Mr. Lamarca threatened that if the attorney ever came to see him again, he would seriously hurt him." (R-8, 1073). Dr. Caddy was asked to examine Lamarca to determine "the rationality of his thinking" and whether or not he could give CCRC some advice "on how to possibly manage what was clearly a very difficult client." (R-8, 1073). He was also asked to examine Lamarca's competency at the time of trial. (R-8, 1075).

Dr. Caddy concluded that Lamarca became incompetent during trial. Characteristic with his history and background after Tonya testified his "paranoia kicked in such that he came to believe in my view incorrectly that he was the only person who he could rely on and he was therefore going to control the

universe." (R-8, 1076). Based upon his rapidly evolving "delusional system" he was no longer "able to make rational, meaningful, sensible, voluntary choices to look at his own broader interests, and he was only able to focus on the profound emotional components that were now driving him." Id. In Dr. Caddy's view, he was initially competent to stand trial but after Tonya testified, Lamarca became incompetent. (R-8, 1077). Although Lamarca knew Tonya claimed he had sexually assaulted her, he thought that she would not look at him in court and testify against him. His whole belief system, keeping it within the family and having some internal family sense of honor. She had become the vehicle by which the state was going to prove he murdered his son-in-law. (R-8, 1078).

Lamarca's relationship with his attorneys deteriorated, he thought that they failed to adequately challenge the state's case and "he perceived their failure to address in his mind as evidence of them either not believing in their client or abandoning their responsibilities to defend him." (R-8, 1079). So, his response was "I apologize, well fuck you too." (R-8, 1079). "This is a man who always acts on the world. He acts often violently, often irrationally, often with drugs, often with alcohol, but he always acts. So you would be asking him to do something which is absolutely inconsistent with his whole software programming to expect that he would remain silent, even

if reacting that way he was furthering his own destruction." (R-8, 1084). He also did not want to involve his family in the penalty phase to protect them and himself largely based upon his views of Tonya's rape allegation. (R-8, 1087-88). In Dr. Caddy's opinion, Lamarca was incompetent at the time he waived his right to remain silent and was not competent to waive mitigation. (R-8, 1092).

Dr. Caddy admitted he did not talk to Eide or McClure in an attempt to understand the underlying dynamics of their relationship with Lamarca. (R-8, 1100). Dr. Caddy testified that he was opposed to the death penalty on a number of grounds. (R-8, 1107-08). Dr. Caddy testified that he spoke to Ms. McClure on three occasions. (R-8, 1109). Dr. Caddy did not recall the details of his discussions with Ms. McClure, but was sure he gave her some type of opinion or debriefing after his examination of Lamarca. (R-8, 1109). Dr. Caddy testified that since he did not recall his conversations with Ms. McClure, he did not "remember a moral dilemma" that he may have been grappling with at the time. (R-8, 1110). Although he did not recall his exact conversations with Ms. McClure in 1997, he suspected that he did not tell her Lamarca was incompetent at the time because he did not have an opinion on his competency. (R-8, 1131).

Dr. Caddy's notes began with a statement from Lamarca that

he wanted the death penalty. (R-8, 1114). His notes on family relationships began with the note that Lamarca's older brother tried to shoot Lamarca. (R-8, 1114). The notes reflect Lamarca telling him that Joseph fired approximately six rounds in relatively close range to Lamarca who jumped up or around a bed in order to dodge the bullets. (R-8, 114-15).

Dr. Caddy acknowledged going over some of the events of December 2, 1995, with Lamarca. (R-8, 1117-18). His discussions with Lamarca included his interaction with his family, Tonya, Tina, and Kevin Flynn. (R-8, 1118). He said that when Tina was living in the trailer she was running around in flimsy underwear and that she was leaving. That was the reason for the exchange of cars. (R-8, 1119). Lamarca told him that he asked to borrow Tonya's car and she told him he needed to ask Kevin. (R-8, 1119). Lamarca said that Tina wanted the car and that she was leaving him. (R-8, 1120). After picking up Tonya, "she told me that Tina had told her what I had done. And what he was referring to as I recall was a sexual encounter between Tina and Anthony Lamarca." (R-8, 1112-21). According to Lamarca, Tonya responded by stating that she wished it were her with whom he had been sexual. (R-8, 1121). He talked about drinking tequila and that when he got to the house he got sick in the bathroom. (R-8, 1121). Once in the house, she helped him undress and Tonya indicated that she was not good enough,

that he Lamarca “can rape my sister but I’m not good enough and she walks out.” (R-8, 1121). Then, she got the rifle and fired it through one of the windows, Lamarca said he took the gun away from her and she’s crying and saying how much she wanted him. (R-8, 1121). She told him she knew what she wanted and Lamarca said “we did it all.” (R-8, 1121). Afterward, she said “I’ve got to go, and she went. I know she won’t find out. I know what will happen. I decided to leave.” (R-8, 1121-22).

Dr. Caddy testified that Lamarca did not tell him what transpired when he drove with Kevin Flynn from the bar to his trailer. (R-8, 1122). Lamarca did not confess to him that he killed Kevin Flynn. (R-8, 1122).

Although he claimed not to recall his conversation with Ms. McClure, Dr. Caddy thought he might have offered the facts he knew about the offense and proposed a series of “explanations” or “hypothetical” facts “about his involvement in the crime.” (R-10, 1356). At the end of his time with Lamarca, “he did not deny to me his involvement, but he didn’t specifically admit it.” (R-10, 1356-57). Dr. Caddy thought Ms. McClure’s notes reflect his hypothesis as opposed to a specific confession. (R-10, 1357). He thought Ms. McClure might have extended his hypothesis into a total confession by Lamarca. (R-10, 1360).

Dr. Sydney Merin was called by the State and is a psychologist specializing in clinical and neuropsychology. (R-

10, 1361). Considering cases where capital punishment was an option, he examined defendants considering competency, or sanity "upwards of about 650" cases. (R-10, 1363).

Dr. Merin became involved in the Lamarca case in 1997 when the state retained him and he reviewed documents relating to the offense and Lamarca. (R-10, 1366). He sought to evaluate Lamarca in 1997, but Lamarca refused to see him for an interview and evaluation. (R-10, 1367). Prior to testifying at the evidentiary hearing on Lamarca's competency, Dr. Merin was provided "voluminous material" to review. (R-10, 1370-71). Among the items he reviewed were trial transcripts, the proffer of Dr. Caddy's testimony, testing material administered by Dr. Caddy, a deposition of Dr. Buffington, statements and notes from the trial attorneys' file, probation parole records, Lamarca's notes to his defense attorneys, DOC and jail records, prison medical records, Lamarca's correspondence, and heard the testimony of Dr. Caddy and Ms. Furtick during the post-conviction hearing. (R-10, 1373-74). However, Dr. Merin did not have the opportunity to examine Mr. Lamarca, which would have been "much better." (R-10, 1374). Nonetheless, Dr. Merin felt he had sufficient information to render an opinion regarding competency. (R-10, 1374).

Dr. Merin did not believe Lamarca suffered from Post Traumatic Stress Disorder. He may feel anxiety about certain

things, but that anxiety would be normal. (R-10, 1382). People with PTSD "tend to lose interest in outside events and they withdraw into their own social group or social environment. They don't withdraw from reality." (R-10, 1380-81). Importantly, Dr. Merin explained, "in the entire phenomena of PTSD is the individual's efforts to avoid being confronted with anything that reminds him of the traumatic event...So they avoid activities that may be associated with that trauma." (R-10, 1379). He acknowledged, however, that Dr. Maher, the original defense expert, had diagnosed Lamarca with PTSD. Dr. Merin disagreed with that diagnosis, stating that he often disagreed with Dr. Maher. (R-10, 1429).

Dr. Merin reviewed the two MMPI's administered to Lamarca. The 1985 test revealed scale 4, the psychopathic deviate (PD) scale, was the most elevated clinical scale. (R-10, 1384-85). Another elevated scale was the MA, which is referred to the energy scale or hypo-mania scale. This means that Lamarca possessed a high level of energy, and, that he will express it in an "outward sort of way." (R-10, 1385-86). Scale Eight, or the Schizophrenia scale, was slightly elevated. This did not necessarily mean psychotic, but that this person may live with themselves or is emotionally withdrawn. (R-10, 1386). The interpretation of Lamarca's 1985 MMPI was that of a person "who is very likely to act out their feelings, and the expressions of

these feelings with a high degree of probability are those associated with antisocial activities." (R-10, 1386). The later test from Dr. Caddy's examination, revealed "an exceptionally high elevation of the PD [psychopathic deviate] scale, higher than the original administration in 1985." (R-10, 1388).

Since he did not have the opportunity to examine Lamarca Dr. Merin could not render a formal Anti-Social Personality Disorder diagnosis. However, he could describe Lamarca as an "anti-social personality." (R-10, 1405). His description of Lamarca emanates from his review of the MMPI's, his own statements, "and review of the documents." (R-10, 1405). An anti-social personality is characterized by an individual who acts on impulse and generally resists or defies the standards and values of society. (R-10, 1391). They can be manipulative, con artists, and their emotional attachments are rather shallow. (R-10, 1391). Those people are often found in jail because of acting out tendencies that breach legal and social values. (R-10, 1392). The high scores on the PD scale would suggest that Lamarca had an antisocial personality. (R-10, 1392). These people are deficient in conscience. (R-10, 1394). "The rules of society, the rules of the world are not accepted by them, even though they know what the rules are." (R-10, 1394).

Dr. Merin found no indication in this case that Lamarca was

incompetent. He made judgments and decisions, and, those decisions were not driven by any impairment of his brain. (R-10, 1398). Based upon all the materials he reviewed and listening to the testimony of Shirley Furtick and Dr. Caddy, he came to the conclusion within a reasonable degree of psychological certainty that Lamarca had a rational and factual understanding of the proceedings against him. (R-10, 1400). There is nothing to indicate that at the conclusion of Tonya's trial testimony that Lamarca became incompetent to make volitional choices. (R-10, 1400). "Nothing at all that I've reviewed, or read, or understand" would indicate that Lamarca became incompetent to proceed with his trial. (R-10, 1401). He was competent to waive the right to remain silent and testify in his own behalf, and, to fire his lawyers and waive the presentation of mitigating evidence. (R-10, 1401-02).

Any additional facts necessary for disposition of the issues presently before this Court will be discussed in the argument, *infra*.

SUMMARY OF THE ARGUMENT

ISSUE I--The experienced defense attorneys had appellant examined by a qualified mental health expert who concluded that appellant was competent. The attorneys interacted extensively with the appellant throughout the trial and had no reason to question his competence. Finally, appellant failed to establish

that he was incompetent at the time of trial.

ISSUE II--Appellant's attorneys were not ineffective in failing to move to suppress the rifle recovered from his father's home. Appellant abandoned the rifle in the home and the father executed a voluntary consent to search the house.

ISSUE III--The defense attorneys were not ineffective in cross-examining appellant's rape victim, Tonya Flynn. They made reasonable tactical decisions on the scope and content of cross-examination and impeachment.

ISSUE IV--Appellant's defense attorneys were clearly prepared for trial.

ISSUE V--Defense counsel effectively cross-examined state witness Darren Brown. Mr. Brown testified on a largely uncontested issue (flight) and more extensive cross-examination could have opened the door to damaging statements.

ISSUE VI--Trial counsel was not ineffective for failing to call Lori Lamarca/Galloway as a witness. The witness had provided inconsistent statements to the defense team and could provide little favorable testimony. The State did not offer any false testimony nor did it threaten or intimidate any potential witness.

ISSUE VII--Trial counsel was not ineffective for failing to offer the testimony of James Zaccagnino. The witness was hard of hearing and easily impeached by his relationship to Lamarca

and his criminal record.

ISSUE VIII--Trial counsel made a reasonable tactical decision not to call Steve Slack. He had been drinking and offered potentially damaging testimony to Lamarca.

ISSUE IX--Witness Jeremy Smith did not have an undisclosed deal with the State.

ISSUE X--Trial defense counsel was not ineffective for failing to offer expert testimony on the lack of genetic material recovered after the rape. Counsel argued the lack of corroborating evidence in closing. Moreover, offering such an expert would reveal incriminating physical evidence to corroborate Tonya's testimony.

ISSUE XI--The defendant hindered, hampered, and obstructed his attorneys attempts to obtain mitigating evidence. Under these difficult circumstances, his defense attorneys did an admirable job preparing for the penalty phase. Appellant precluded his attorneys from presenting any evidence on his behalf.

ISSUE XII--Appellant's claim that his death sentence is unconstitutional because it relies upon a single aggravating circumstance is procedurally barred and without merit.

ISSUES XIII and XIV--The State properly presented evidence of appellant's prior armed kidnapping and armed attempted sexual battery convictions.

ISSUE XV--The trial court did not abuse its discretion in

allowing the prosecutor, who was called as a witness for Lamarca, to represent the State during the post-conviction hearing.

ISSUE XVI--Trial counsel was not ineffective in failing to impeach witness Jeremy Smith with a misdemeanor retail theft conviction.

ISSUE XVII--Appellant presented no evidence from a ballistics expert during the hearing below.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S CLAIM THAT HIS DEFENSE ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO ENSURE DEFENDANT WAS COMPETENT TO PROCEED? (STATED BY APPELLEE).

Appellant claims that he was denied the right to effective assistance of counsel because his attorneys failed to protect his rights when it became apparent the appellant was incompetent to proceed. The State disagrees. The trial court properly rejected this claim after an evidentiary hearing below.

A. Standard Of Review

This Court summarized the appropriate standard of review in State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000):

> Ineffective assistance of counsel claims present a mixed question of law and fact subject to plenary review based on the Strickland test. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996). This requires

> an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings.

This Court has stated that "[w]e recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). Consequently, this Court will not "substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of witnesses as well as the weight to be given to the evidence by the trial court." Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984)(citing Goldfarb v. Robertson, 82 So. 2d 504, 506 (Fla. 1955)).

B. Preliminary Statement On Applicable Legal Standards For Ineffective Assistance Of Counsel Claims

Of course, the proper test for attorney performance is that of reasonably effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The two-prong test for ineffective assistance of counsel established in Strickland requires a defendant to show deficient performance by counsel, and that the deficient performance prejudiced the defense. In any ineffectiveness case, judicial scrutiny of an attorney's performance must be highly deferential and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 694. A fair assessment of attorney performance requires every

effort be made to eliminate the distorting effects of hindsight. Id. at 696. "The Supreme Court has recognized that because representation is an art and not a science, '[e]ven the best criminal defense attorneys would not defend a particular client in the same way.'" Waters v. Thomas, 46 F.3d 1506 (11th Cir.)(*en banc*), cert. denied, 116 S.Ct. 490 (1995) (citing Strickland, 466 U.S. at 689).

The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been better. Rather, prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364 (1993). The Defendant bears the full responsibility of affirmatively proving prejudice because "[t]he government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence." Strickland, 466 U.S. at 693.

C. Appellant's Two Defense Attorneys Were Not Ineffective In Uncovering Or Presenting Lamarca's Incompetence Because He Was Not Incompetent To Proceed At Any Point During The Trial Below

The trial court below rejected appellant's assertion that he received ineffective assistance from failing to uncover or present Lamarca's incompetence. After extensively discussing the facts introduced during the evidentiary hearing below, the trial court noted that the defense team retained Dr. Michael

Maher, who found that Lamarca was competent and discussed the presentation of non-statutory mitigation with Ms. McClure. (R-3, 355). The Court did not find the testimony of Dr. Caddy credible or persuasive. The trial court stated, part:

> Although Dr. Caddy was articulate, he was not a particularly credible witness in this case. First, he testified that his most recent involvement in this case prior to trial occurred on October 9, 1997. However, State's Exhibit #27 reflects that Mrs. McClure, through her investigator, contacted him months earlier in order to procure a copy of his psychological evaluation. Second, and more importantly, he testified on direct examination that the defendant never admitted his involvement in the murder to him. However, the typed memorandum dated November 16, 1997 completely refutes this assertion. Subsequently, when CCRC recalled Dr. Caddy at the evidentiary hearing, Dr. Caddy explained the following: the defendant never actually confessed to the crime; the apparent confession was just the defendant's response to his series of hypothetical questions; he would have corrected Mrs. McClure's misunderstanding that the defendant actually confessed his involvement in the murder, as exemplified by her handwritten notes, had he seen her handwritten notes prior to the evidentiary hearing. Mrs. McClure, on June 27, 2003, testified that Dr. Caddy had never mentioned anything about a "hypothetical," or a series of hypothetical questions.
>
> (R-3, 356-57)

After extensively discussing the facts developed below, the trial court rejected Lamarca's allegation that his attorneys rendered ineffective assistance, stating:

> ...The uncontroverted testimony of Mr. Eide and Mrs. McClure on this point reflects that the defendant acted rationally, consulted with them about his case, and was of sound mind prior to and during trial. The evidence demonstrates that the defendant cooperated in

> his defense; he prepared a memorandum of law on the motion to suppress as well as an outline on how best to cross-examine Tonya Flynn (see State's Exhibit #23). Dr. Maher, a highly qualified expert, evaluated the defendant prior to trial and informed Mrs. McClure that the defendant was not psychotic, but was in fact competent to proceed. While differing in opinion from Dr. Maher as to the nature of the defendant's personality disorder, Dr. Merin concluded, like Dr. Maher, that the defendant was competent to proceed. The defendant, at the time of trial and during the evidentiary hearing, has interacted with his attorneys and behaved rationally and normally. It is of little consequence that Dr. Caddy suddenly testifies that the defendant "went incompetent" after Tonya Flynn testified at trial; it is not unusual for CCRC to locate experts who, during the collateral postconviction proceedings, testify favorably for the defendant in terms of competence and mitigation. Downs v. State, 740 So. 2d 506 (Fla. 1999); Jones v. State, 732 So. 2d 313, 317-318 (Fla. 1999).
>
> In concluding this claim, the court notes the following. As the record reflects, the defendant meaningfully participated in the colloquies surrounding his election to testify, his subsequent discharge of counsel, and his waiver of mitigation. In fact, he was quite articulate in his decision to discharge counsel and proceed pro se, telling the court:
>
> > I elected to do this. I asked my attorneys to withdraw. I am satisfied with their representation previous to this. I hope they will stay for the rest of it, but I wish to do this, yes.
> >
> > (R-3, 358-59)

Lamarca's claim rests almost entirely on the testimony of Dr. Caddy. He fails to address the trial court's negative credibility finding on Dr. Caddy, much less argue how the court's ruling was erroneous.

Ms. McClure's detailed notes reflect that Lamarca admitted to Dr. Caddy that he killed Kevin Flynn and provided factual

details surrounding the event. Although Dr. Caddy testified to the contrary during the evidentiary hearing, it was clear that not only did Lamarca admit he murdered Kevin Flynn, but that Mrs. McClure and Dr. Caddy discussed the ethical or moral dilemma this admission presented. They discussed whether or not Dr. Caddy would be forced to admit this fact if he was called to testify on Lamarca's behalf. (R-11, 1495-96; 1502).

Aside from Dr. Caddy's lack of credibility, Lamarca's ineffective assistance of counsel claim should fail because, incredibly, Dr. Caddy, having examined Lamarca at the time he waived his penalty phase, did not tell Mrs. McClure that he thought Lamarca was incompetent to waive his penalty phase. Indeed, he testified during the evidentiary hearing below that he did not question Lamarca's competency at the time he examined him, because at the time he had no opinion on Lamarca's competency. (R-8, 1131). Consequently, Dr. Caddy was not available to testify at the time of trial or penalty phase in 1997 that Lamarca was incompetent.

Lamarca's claim also fails because he failed to establish that he was in fact, incompetent at any point during the

proceedings below.[11] See James v. Singletary, 957 F.2d 1562, 1571-72 (11th Cir. 1992)(failure to hold competency hearing harmless error if defendant was competent at the time of trial). The judge had the opportunity to observe Lamarca during the trial below, interact with him, and, question him prior to allowing him to represent himself during the penalty phase. The court observed nothing in Lamarca's behavior that would suggest Lamarca was incompetent. See Sanchez-Velasco v. State, 702 So. 2d 224, 227 (Fla. 1997) ("Our decision in Durocher requires a mental health evaluation only when the Faretta-type evaluation leaves the judge with doubts as to the defendant's competency."). The trial court's observations of Lamarca are supported by the defense attorneys who personally interacted with Lamarca prior to and during the trial, testifying that they observed no indication that Lamarca was incompetent. (R-8, 1201-02, 1203, 1217).

Dr. Caddy thought that Tonya's testimony triggered Lamarca's incompetence, that based upon his personality, he was helpless

[11]"[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." Godinez v. Moran, 509 U.S. 389 (1993). "Absent some contrary indication, state and federal trial judges are entitled to presume that defendants are competent." United States v. Day, 949 F.2d 973, 974 (8th Cir. 1991)(citing Smith v. Armontrout, 865 F.2d 1502, 1506 (8th Cir. 1988)(*en banc*)).

not to react and became a man bent on a "glory trail." The problem with this theory is that Lamarca always knew that Tonya was going to testify about the rape, he read her deposition in the case, and, according to Eide, displayed no change in demeanor when she testified. (R-11, 1524-25). Lamarca even wrote notes regarding Tonya's previous deposition and suggested ways the defense could effectively cross-examine her. (R-8, 1204). There was nothing prior to Tonya's testimony or after it which led Eide to believe Lamarca was not competent to proceed. After Tonya testified, Lamarca continued to rationally discuss his case with Mr. Eide and Mrs. McClure.[12] (R-11, 1527). In fact, Lamarca testified after Tonya and denied any responsibility for Mr. Flynn's death.

Lamarca's stance on the penalty phase was consistent from March 1996 until the penalty phase. He did not want a penalty phase and did not want defense attorneys to present penalty phase witnesses. (R-8, 1158). Consequently, Tonya's testimony was not the trigger which made Lamarca incompetent, or, as Dr. Caddy put it, a man bent on a "blaze of glory trail." (R-8,

[12]The one indication of an allegedly bizarre behavior on the part of Lamarca, as noted by the trial court, was Lamarca's flash of anger, banging his head against the wall. Lamarca was angry with Ms. McClure for bringing two family members into the courtroom in an effort to convince him to let them testify during the penalty phase. "He was livid, not bazaar (sic)." (R-9, 1325).

1085).

Lamarca did not call Dr. Maher and the defense did not otherwise fault or criticize either Dr. Maher's qualifications or his evaluation of Lamarca prior to trial. Dr. Maher found Lamarca competent to proceed. (R-8, 1159). As this Court has repeatedly recognized, "counsel's reasonable mental health investigation is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert.'" Gaskin v. State, 822 So. 2d 1243, 1250 (Fla. 2002)(quoting Asay v. State, 769 So. 2d 974, 986 (Fla. 2000)). Moreover, the expert called by the State, Dr. Merin, found nothing to indicate Lamarca was incompetent either prior to trial or during the trial. Dr. Merin concluded that Lamarca was an antisocial personality type who was prone to make poor decisions, lack empathy, and engage in antisocial or criminal behavior. (R-10, 1391-92; 1395; 1398, 1405). However, this personality impairment did not render Lamarca incompetent to proceed. Lamarca had a rational and factual understanding of the proceedings against him and there is nothing to indicate that at the conclusion of Tonya's testimony that he became incompetent to make volitional choices. (R-10, 1400-01).

The trial court's order denying Lamarca relief on this claim is supported by the record and should be affirmed by this Court.

ISSUE II

WHETHER LAMARCA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE FOR FAILING TO FILE A MOTION TO SUPPRESS EVIDENCE SEIZED FROM LAMARCA'S FATHER'S HOUSE. (STATED BY APPELLEE).

Lamarca next claims his attorneys were ineffective for failing to move to suppress evidence seized from his father's home after the murder. His brief purports to recite facts relevant to the suppression issue but provides no cites to support his version of the facts. (Appellant's Brief at 23). The most he can offer is reference to a deposition of Lamarca's father which was admitted into evidence below. However, the defense presented absolutely no relevant, admissible, testimony below to show that the father's consent to the search was involuntary.

In denying this issue, the trial court stated:

> ...Mr. Eide explained, however, that after conducting legal research and reviewing statements made by Joseph and Angela Lamarca, he concluded that the defendant lacked standing to file the motion. Mr. Eide testified that the defendant agreed with his conclusion. At the hearing on June 27, 2003, Mr. Eide again confirmed that he and the defendant discussed the filing of a motion to suppress, and that it was agreed that the testimony of the defendant's father and sister would not permit a factually sound basis on which to predicate the motion. [page 68]. Mr. Eide explained that such a motion would have been frivolous and that it was unethical to file frivolous motions.
>
> The evidence corroborates Mr. Eide's testimony. State's Exhibit #28, which contains a copy of handwritten notes authored by Nora McClure, reflects that the following occurs during a jail visit on September 12, 1997: "Ron [Eide] told Tony [the defendant] he didn't believe we could file Mot to

> Suppress b/c his dad had given sworn testimony that contradicted his 'standing' issue. He sd [said] he was ok w/that."
>
> The court finds that CCRC has failed, at the hearing and in its amended motion, to show or even allege that Mr. Eide's legal research was erroneous. Nor has CCRC presented any testimony to contradict the facts upon which Mr. Eide's research was based. Accordingly, CCRC has failed to demonstrate that either Mr. Eide or Mrs. McClure rendered deficient performance in failing to file a motion to suppress. This claim fails under Strickland, and is therefore denied. (R-3, 359-60)

The defense did not offer the testimony of Lamarca's sister or father to show that Lamarca had standing to contest the search or that Lamarca, Sr.'s consent to search was involuntary. Rather, they presented the testimony of Lamarca's brother, Joseph, who had mental problems and who Lamarca had led the defense attorneys to believe would be of no help at all to the defense.[13] Interestingly enough, Joseph Lamarca testified during the evidentiary hearing that his brother would check up on him "mostly every day" in 1992 and 1993. However, Lamarca was incarcerated in 1992 and 1993. (R-7, 931). Thus, his testimony that Lamarca had a key and was allowed in the house, is suspect. After talking to Joe Lamarca, Sr., and Angela, Eide testified that Lamarca's access to the house was more limited than Lamarca had indicated. In fact, Lamarca's father told Eide he did not have a key to the house. (R-5, 580; R-11, 1550). In any case,

[13]Lamarca told the defense team that his brother was mentally ill, that he had killed people, pled insanity, and been hospitalized. (R-8, 1190).

even if Lamarca was allowed as a visitor in the house, that fact alone would not provide Lamarca standing to challenge the search.

Lamarca did not have a room in the house, was not living there and did not have any other possessory interest which might provide standing.[14] See Rakas v. Illinois, 439 U.S. 128, 143 (1978)("To successfully claim the protection afforded by the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched and that this expectation is reasonable."). At the time the house was searched, Lamarca had left the house and therefore had no expectation of privacy in it. Moreover, Lamarca abandoned the rifle in his father's home and his father's consent to search was not shown to be invalid. Consequently, Eide's testimony below that he did not file a motion because it would be frivolous, is supported by the record. Lamarca presented nothing during the hearing below to show that counsel's performance in failing to file the motion constituted deficient

[14]The authority cited by Lamarca address a person's private home, e.g., Payton v. New York, 445 U.S. 573 (1980), not a place where an individual is at best, an invited guest. Here, Lamarca broke in the door to his father's home and after taking coins and raping Tonya, left the home, leaving the murder weapon behind. Whatever privacy interest, if any, Lamarca possessed in the home, ended upon his leaving the home. See generally Minnesota v. Carter, 525 U.S. 83 (1998). The father, who had a privacy interest in the home he owned, executed a waiver and the rifle was recovered.

performance, or, that he was prejudiced by the alleged deficiency.

At the conclusion of his argument on the unrelated issue of ineffective assistance of counsel, Lamarca claims the state committed prosecutorial misconduct by showing pictures of the doors which were forced open by Lamarca in violation of a motion in limine. This claim of prosecutorial misconduct is procedurally barred from review in a post-conviction motion. See Spencer v. State, 842 So. 2d 52, 60 (Fla. 2003)("substantive claims of prosecutorial misconduct could and should have been raised on direct appeal and thus are procedurally barred from consideration in a post-conviction motion."). Moreover, Lamarca provides no record cites to support this proposition, nor does he indicate what evidence he relies upon to assert the doors were forced open by the police. To the contrary, Mr. Martin, the prosecutor, testified that he had no information to suggest the police broke the doors. The photographs "were consistent with the doors that Tonya described as being broken at the time that Mr. Lamarca assaulted her, took her into the house at knife point, drug her through the house and went into the bedroom." (R-7, 908). Two doors were in fact found broken in the house. (R-7, 904).

Lamarca's argument is improperly encompassed within an unrelated claim of ineffective counsel and is otherwise

meritless. His claim of prosecutorial misconduct therefore should be summarily rejected.

ISSUE III

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE IN FAILING TO EFFECTIVELY CROSS-EXAMINE TONYA FLYNN? (STATED BY APPELLEE).

Lamarca asserts his defense attorneys were ineffective for failing to effectively cross-examine Tonya Flynn, Lamarca's daughter. Lamarca begins his argument by stating that counsel never redeposed Tonya Flynn after being given permission by the court to do so. (Appellant's Brief at 30). However, during the evidentiary hearing below, counsel for CCRC agreed that summary judgment on this claim was appropriate. In a colloquy with the court below, Mr. Cannon [collateral counsel] agreed with the trial court that the defense attorneys had in fact deposed Tonya a second time but did not have the deposition transcribed: "Correct, with regards to only that claim that there's no second deposition." (R-10, 1437). Despite this concession below, Lamarca, amazingly, through the same collateral counsel, maintains that Tonya was not deposed a second time by trial counsel. This issue remains without merit on appeal.

Lamarca also asserts that Tonya admits making false statements and that her demeanor on the 911 tape "do not indicate someone who was the victim of sexual battery." (Appellant's Brief at 30). He provides no record support for

his proposition that Tonya admitted she lied, or, what witness if any, determined that Tonya's demeanor on the 911 call was uncharacteristic of a rape victim. These contentions are simply unsupported and like much of Lamarca's brief, he fails to provide any record cites to support his argument.

The majority of collateral counsel's assertions of ineffectiveness for failing to impeach Tonya generally reference depositions and an allegedly inconsistent statement from Tonya. However, Tonya was not called to testify by the defense during the evidentiary hearing below and Lamarca has therefore failed to establish the effectiveness, or weight of the vast majority of the proposed impeachment testimony.[15] Although discovery depositions were admitted into evidence below, they were not admitted pursuant to a stipulation of the truthfulness of their assertions. They were simply admitted below as part of the trial attorneys' file. If collateral counsel desired to establish relevant, admissible impeachment testimony, he had an obligation to call Tonya, or, the witness who would provide the allegedly impeaching testimony. Lamarca did in fact call Steve Slack to testify and FDLE expert Sue Livingston in an attempt to establish impeachment evidence. However, it is improper for Lamarca to simply point to material such as a deposition or police report and suggest that Tonya's trial testimony would

[15]Obviously, at trial Tonya would have been given the opportunity to explain any alleged inconsistencies.

somehow be impeached by that material. See generally Rodriguez v. State, 609 So. 2d 493, 498-99 (Fla. 1992) (discovery depositions generally constitute hearsay and are not admissible as substantive evidence).

For example, Lamarca asserts that Tonya told Stacie Morrison that Lamarca ejaculated on bed sheets during the sexual battery but told Molly Jerman, who conducted the S.A.V.E. exam that he did not ejaculate. (Appellant's Brief at 31). However, the defense did not call Molly Jerman as a witness to support their interpretation of the S.A.V.E. exam to establish the allegedly impeaching information.[16]

The primary thrust of Lamarca's argument is that the defense failed to effectively impeach Tonya on her testimony regarding the sexual battery. In rejecting this claim below, the trial court stated:

> The sum and substance of Mr. Eide's testimony on this point was that he deliberately limited his cross-examination of Tonya regarding the sexual battery to avoid opening a door that would permit the State to introduce additional evidence concerning the sexual battery, evidence that had not been introduced, such as the S.A.V.E. exam, the DNA evidence, which reflected that the defendant was a possible donor of the saliva found on Tonya's breast, and the evidence of strangulation, which was consistent with Tonya's version of the sexual battery.

[16]The trial court found that Lamarca failed to establish either deficient performance or prejudice, noting that much of the alleged inconsistencies were either a) not inconsistent, b) would have required calling Tonya as a witness, or c) not even proper cross-examination.

> . . .
>
> Finally, although Tonya was not cross-examined on the alleged inconsistent statements concerning the sexual battery, a review of the trial transcript reflects that Mr. Eide extensively argued the lack of DNA evidence surrounding the sexual battery during closing arguments. During his first argument, he argued that Tonya's testimony was unworthy of belief. Tonya testified that the defendant ejaculated on the sheet. However, no ejaculate or semen was ever found on the bed sheets. Mr. Eide argued this in full to the jury. He concluded his first argument by surmising that the sexual battery, as recounted by Tonya, was simply "implausible." During his final argument, Mr. Eide argued: "And it's interesting that in his hour of discussion with you he [the prosecutor] never discussed the absence of any corroborative scientific testimony for Tonya's accusation of rape." Subsequently, he argued: "We talked about the fact that there's no semen on the sheets. There's no scientific evidence, there's no DNA, there's -- there's no microscopic analysis of these sheets. There's been nothing presented. If they'd had it, you'd have heard it."
>
> (R-3, 360-361)

In his brief, Lamarca incorrectly states that Eide admitted "there was no physical evidence of rape." (Appellant's Brief at 31). To the contrary, Eide knew that the S.A.V.E. exam and potential testimony of the State's forensic expert, would be damaging to the defendant. While the State did not have evidence of Lamarca's semen on the bed sheets, they did have saliva on Tonya's breast which was consistent with Lamarca's DNA[17] "and evidence of marks on her neck." (R-4, 513). Eide was

[17]Sue Livingston testified that a swab taken from Tonya's face revealed genetic markers consistent with Tonya. (R-3, 432). A second swab from Tonya's breast revealed a mixture consistent with Tonya and Lamarca's DNA, but excluded Kevin Flynn. (R-3, 433-34). Assuming one donor of saliva on the breast was Tonya,

also aware that the S.A.V.E. exam revealed fresh injuries to Tonya, including redness around the vagina and anal area. (R-5, 594-95). The evidence of strangulation around Tonya's throat was consistent with Tonya's testimony that Lamarca grabbed her around the neck, kicked in the door, and dragged her inside. (R-5, 595).

If the defense had called Sue Livingston to establish the fact that Lamarca's semen had not been detected, the State would point out that saliva consistent with Lamarca's was found on Tonya's breast. Moreover, it might open the door to allow the State to introduce additional evidence, such as the S.A.V.E. exam which revealed fresh injuries consistent with Tonya's testimony and two "outcry" witnesses.[18] (R-5, 594-95).

As the trial court noted below, Eide made a strategic decision to not present physical evidence which arguably contradicted Tonya's testimony [the absence of semen], because he did not want to open the door to other damaging corroborating evidence which could be presented by the State. Such a tactical decision is almost immune from post-conviction attack. See

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the possibility of finding another contributor in the general population with the genetic markers consistent with Lamarca's were "approximately one in 390." (R-3, 435).

[18]Terry Flynn, the victim's stepmother, was available to testify that at 1:30 or 2:00 in the morning Tonya told her "Daddy raped me." (R-5, 594). Todd Shetterly, Tonya's uncle, also met with Tonya after driving back from Hudson. She told him about being raped by Lamarca. (R-5, 594).

Johnson v. State, 769 So. 2d 990, 1001 (Fla. 2001)("Counsel's strategic decisions will not be second guessed on collateral attack."). "This Court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected." Spencer, 842 So. 2d at 62; accord Valle v. State, 778 So. 2d 960 (Fla. 2001). Indeed, Eide testified that he tried to maintain a balancing act and thought even the judge "indicated that we had to be careful about opening the door." (R-4, 522-23). Moreover, the defense argued the lack of physical evidence presented by the State to establish the sexual battery in closing.

The defense was aware of Steve Slack, deposed him prior to trial, and decided not to call him as a witness. Slack testified that when Tonya arrived back from Hudson she told him that Lamarca had raped her sister, "Tina." (R-11, 1477). However, he testified that he had been drinking, that Tonya was upset and that Lamarca was mad or upset prior to leaving the bar with the victim. (R-11, 1477, 1479, 1528). Eide determined that calling Slack to impeach Tonya on her alleged failure to claim rape when she returned to the bar was not worth losing closing argument. Moreover, Eide was aware the State might call detective Madden in rebuttal, who reported that Slack said Lamarca raped her. (R-5, 649-50; R-11, 1534).

The failure to call Slack was not the result of inadvertence or a failure to investigate. It was a tactical decision made by a highly experienced trial defense attorney. A decision that has not been shown to be unreasonable even using prohibited "20/20" hindsight. Slack was of limited value to the defense and provided some potentially damaging testimony [Lamarca was angry, left with the victim, and Tonya was upset and asserted that Lamarca had raped her sister]. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000), *en banc*, ("When courts are examining the performance of an experienced trial counsel, the presumption of that his conduct was reasonable is even stronger."). Lamarca failed to establish either deficient performance or resulting prejudice.

Finally, Lamarca asserts that Tonya should have been questioned about Hughes statement in jail that Lamarca said he was going to kill Kevin because he raped her. (Appellant's Brief at 33). However, it is unclear exactly how Tonya could have been impeached by a statement Hughes overheard Lamarca make in prison. Tonya was not a participant in the conversation, did not hear the statement, and was not asked about it on direct examination. Moreover, even if Kevin never raped Tonya, the statement Lamarca made about wanting to kill his son-in-law still reflected animosity Lamarca had toward the murder victim. Lamarca has neither demonstrated deficient performance or

resulting prejudice from the alleged failure to impeach Tonya on a statement made by Lamarca to Hughes in prison.

ISSUE IV

WHETHER TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO MOVE FOR A CONTINUANCE PRIOR TO TRIAL? (STATED BY APPELLEE).

Lamarca contends that his trial attorneys were unprepared for trial and that they had only "prepared portions of the discovery." (Appellant's Brief at 37-38). However, he fails to articulate what prejudice if any, resulted, from the alleged failure to request a continuance. Moreover, he fails to acknowledge, much less address the trial court's findings or the trial attorneys testimony below that they were, in fact, prepared for trial. Lamarca's argument is bereft of supporting facts and entirely devoid of merit.

The trial court rejected this allegation below noting that both Eide and McClure testified that they were ready for trial. The trial court stated in part:

> In conclusion, notwithstanding the fact that CCRC failed to support this claim with any testimony or proof, Mr. Eide and Mrs. McClure offered credible testimony indicating that they were, in fact, prepared for both the guilt and penalty phases. The record evidence supports their testimony. Although CCRC, at the evidentiary hearing, indicated that handwritten notes indicating their lack of preparedness were in evidence with dates of September 17 and October 24, the court has reviewed all of the handwritten notes and has not found sufficient corroborative evidence to support this claim. Accordingly, this claim is without merit and must fail under Strickland.

(R-3, 362-363)

The testimony below supports the trial court's ruling. Eide testified that when he announced ready for trial, he was in fact, ready to proceed. They had taken depositions of all the material witnesses and had sufficient time to discuss the case with Lamarca and develop a strategy. (R-11, 1522-23). Further, Lamarca's assertion that "counsel had not effectively begun to investigate mitigation evidence until after Lamarca was convicted" is false. The record clearly reflects attempts to contact family members for assistance as early as March of 1996, other attempts were made July through October of 1997. (R-9, 1286). Moreover, the defense had retained a mental health expert and had Lamarca examined on June 11, 1997. (R-9, 1308).

The penalty phase investigation was clearly initiated prior to Lamarca's conviction. It was only limited by Lamarca's demand that family members not cooperate with the defense. (R-8, 1180, 1185, 1188). The record supports the trial court's denial of relief on this issue.

ISSUE V

WHETHER TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO EFFECTIVELY CROSS-EXAMINE WITNESS DARREN BROWN? (STATED BY APPELLEE).

Lamarca next asserts that his trial attorneys were ineffective for failing to impeach Darren Brown. The State disagrees.

The trial court rejected this claim below, stating, in part:

> At the hearing on May 29, 2003, Mr. Eide explained that he chose not to cross-examine Darren because Darren only testified to one issue: the defendant's sudden appearance in the state of Washington. Mr. Eide explained that he and the defendant already had an explanation for the defendant's sudden appearance in the state of Washington, and that the defendant himself testified to this explanation when he took the stand. In fact, the defendant conceded, on cross-examination, that his visit was unannounced (see State's Exhibit #8). Mr. Eide testified that he saw nothing to gain by cross-examining Darren on his feeling that he was "threatened," and that cross-examination on this subject may have opened the door to other issues. Mr. Eide explained that "if I can't get anything out of a witness, I'm not going to ask any questions."
>
> . . .
>
> Given the foregoing, the court cannot find that Mr. Eide rendered deficient performance in failing to cross-examine Darren. His explanation as to why he chose to forego cross-examination was well within the range of prevailing standards. As to the alleged "threat," the prosecutors testified that no threats were ever made. Moreover, Mr. Eide explained that he chose not to risk opening the door by cross-examining Darren on his feeling that he was threatened. As such, CCRC has failed to show that Mr. Eide rendered deficient performance or that the defendant suffered resulting prejudice, both of which are required by Strickland. (R-3, 363-64)

The defense failed to call Darren Brown during the evidentiary hearing below and therefore failed to establish the effect, weight, and impact of the proposed cross-examination. This fact alone, in the State's view, should be sufficient grounds to deny relief on this issue. See Spencer v. State, 842 So. 2d 52, 63 (Fla. 2003) (reversible error cannot be predicated on "conjecture.")(citing Sullivan v. State, 303 So. 2d 632, 635

(Fla. 1974)). Appellant failed to establish that any possible cross-examination of Brown which could have countered evidence of flight.

Eide testified below that he saw no reason to impeach Brown on the fact that Lamarca showed up in Washington unexpectedly; Lamarca's own trial testimony was going to be that he arrived up there suddenly. (R-5, 643, 645-46). Brown also had provided various damaging statements prior to trial which Eide did not want to risk opening the door to the State on redirect examination.[19] Id.

Appellant fails to acknowledge, much less address, the trial court's order denying relief on this issue. The trial court's rationale denying relief is based upon testimony adduced below during the evidentiary hearing. Appellant has identified no factual or legal errors in the trial court's order.

ISSUE VI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CALL LORI GALLOWAY AS A WITNESS TO REBUT THE STATE CONTENTION THAT LAMARCA FLED THE STATE AFTER MURDERING THE VICTIM AND WHETHER PRESENTING EVIDENCE OF FLIGHT VIOLATED BRADY/GIGLIO? (STATED BY APPELLEE).

Appellant asserts that his defense attorneys were

[19]Eide was aware of statements Brown made to law enforcement, including that Lamarca "said that he killed his son-in-law because he was an asshole, shot him in the head." (R-5, 638-39). This came out in a deposition as an admission from Lamarca that he "shot some asshole in the head." (R-5, 643).

ineffective in failing to offer the testimony of Lori Galloway/Lamarca to rebut the assertion that Lamarca fled the State or, in the alternative, that the State offered false testimony in presenting evidence of flight. The State disagrees.

The trial court rejected this claim below, stating, in part:

> ...At the hearing on May 29, 2003, Mr. Eide testified that he was aware that the defendant made plans with Lori to visit her upon his release from prison. [transcript from May 29, 2003: Pages 94-95]. He explained, however, that Lori made inconsistent statements about he reasons for the defendant's visit. At first, she told Bill Braun one story. According to his report, Lori told her son, Darren, that the defendant was coming to the state of Washington because he was wanted for the murder of Kevin Flynn, his son-in-law. The report also indicates that the defendant, after he arrived in Washington, bragged about killing his son-in-law to Darren and another individual named Clinton King. On the other hand, Lori told Mrs. McClure that the defendant made plans shortly after Thanksgiving to come visit and spend time with her, and that she knew of his visit four to five days in advance (see State's Exhibit #25).
>
> Mr. Eide explained that if he called Lori as a witness: 1) she likely would have been impeached with her inconsistent statements; 2) he and Mrs. McClure would have been suborning perjury; and 3) it would have undermined the defendant's explanation for his visit to the state of Washington, and again, Mr. Eide wanted to limit the testimony so that the defendant's story appeared credible. [Transcript from May 29, Pages 178-184).
>
> Based upon the testimony of Mr. Eide, and based upon the documentary evidence, the court is unable to conclude that Mr. Eide was deficient in failing to call Lori Galloway-Lamarca as a witness, as required under Strickland. The defendant conceded at trial that his arrival in the state of Washington was "unannounced." In addition, the State adduced

> evidence that the defendant ran from Deputy Sean Kennedy after being seen several hours after the murder (see below) - as the State notes in its response, Lori could not have rebutted this testimony. Mr. Eide considered calling Lori as a witness but rejected the idea based upon the factors outlined above. Spencer v. State, 842 So. 2d 52, 62 (Fla. 2003)("This court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected."). Accordingly, the ineffectiveness claim is hereby denied under Strickland.
>
> (R-3, 365)

Once again, appellant fails to point to any factual inaccuracies in the trial court's order denying relief or even acknowledge the adverse ruling of the trial court below. Lori Galloway/Lamarca had made inconsistent statements and posed an ethical dilemma for Lamarca's attorneys. (R-5, 618-19). As Ms. McClure testified, she provided the defense with two different statements. (R-8, 1214). Finally, as noted by the trial court, Lamarca's own trial testimony was that he arrived in Washington unannounced. (T-30, 1117). Appellant has failed to establish either deficient performance or resulting prejudice based upon defense counsel's failure to call Lori Lamarca/Galloway as a witness.[20]

The trial court rejected the Brady/Giglio claim emanating from statements allegedly made by Lori Lamarca/Galloway,

[20]Appellant's brief states that Tina Lamarca knew of Lamarca's plan to leave for Washington. (Appellant's Brief at 43). However, appellant provides no record cite for this assertion and Tina Lamarca did not testify during the evidentiary hearing below. As an unsupported assertion of collateral counsel, it provides no basis for finding counsel ineffective.

stating:

> CCRC has failed, in every respect, to demonstrate that the State failed to disclose any evidence with respect to Lori Galloway-Lamarca. Mr. Eide and Mrs. McClure were fully aware of the conflicting statements that he made. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2002)("a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant."). This claim thus fails under Brady.
>
> . . .
>
> CCRC contends that "the state, possessing the statement of Lori Galloway, presented testimony to the contrary knowing such evidence was false." CCRC alleges that the State presented evidence of flight through the testimony of Darren Brown and Sergeant Dan Anderson. However, Sergeant Dan Anderson's testimony at trial was very brief. He did not offer any testimony establishing flight. Rather, he only testified to arresting the defendant on or about January 12, in Stevens County, Washington. His testimony was truthful -- the defendant was arrested in the state of Washington and later extradited to Florida.
>
> The testimony of Lori Galloway-Lamarca is improperly relied on by CCRC to show that the State presented other testimony it knew to be *false* because State's Exhibit #6 indicates that Lori herself admitted to Bill Braun that she told her son, Darren, that the defendant murdered Kevin Flynn and was on the run (at the hearing held June 1, 2003, Lori denied ever [] making such a statement). The essential component of a Giglio violation was that the State permitted *false* testimony. In light of the fact that Lori herself made such an admission, CCRC has failed to show that Darren's testimony was indeed false.
>
> Moreover, at trial, Detective Sean Kennedy of the Pasco County Sheriff's Department testified to the following: he spotted the defendant walking shirtless along a road in Pasco County within hours of the murder; upon seeing Detective Kennedy, the defendant fled, after which Detective Kennedy chased him across an open field; the defendant, however, ran into the

> woods; Detective Kennedy did not proceed into the woods after the defendant for officer safety reasons; a K-9 unit was radioed, as was a search helicopter; the defendant, however, evaded capture.
>
> Given the testimony of Detective Kennedy, which establishes a different incident involving flight, CCRC has failed to show that Darren Brown's testimony, which was essentially the only testimony presented by the State to argue guilt based on evidence of flight to the state of Washington, was material to the case, such that his testimony affected the judgment of the jury and undermined the verdict. As such, this claim must also fail under Giglio. (R-3, 366-67)

Appellant fails to cite any factual or legal errors in the trial court's order denying relief. As noted by the trial court below, the defense was fully aware of Lori Galloway/Lamarca and her potential testimony. The problem with Lori Galloway/Lamarca was that she told different stories to the defense investigator and, apparently, even to Lamarca's defense attorneys. (R-8, 1214). The defense lawyers chose not to call her as a witness for this reason. The State did not withhold any information from the defense pursuant to Brady.

Appellant failed to offer any evidence to support his assertion that the State presented false testimony. This Court stated that to establish a violation of Giglio v. United States, 405 U.S. 150 (1972), the defense must establish the following: "1) that the testimony was false; 2) that the prosecutor knew the testimony was false; and 3) that the statement was material." Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001)(string cites omitted). Darren Brown's testimony about

Lamarca showing up in Washington unannounced was not shown to be false. See Tompkins v. Moore, 193 F.3d 1327, 1340 (11th Cir. 1999)("Tompkins has failed to meet the threshold requirement that he show false testimony was used."). If anything, Lori Galloway/Lamarca's testimony concerning Lamarca showing up as part of some prearranged plan is highly suspect. Even Lamarca admitted under oath during trial, that his arrival in Washington was unannounced. Moreover, appellant clearly fled from the police after the murder. Eide noted the following: "[H]e left leaving the belong[ings] in the trailer, his toothbrush, his shaving kit, his shoes." (R-4, 484). The trial court's order denying relief should be affirmed.

ISSUE VII

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL INMATE WITNESS ZACCAGNINO TO REBUT THE TESTIMONY OF MICHAEL HUGHES AND WHETHER PRESENTATION OF HUGHES' TESTIMONY VIOLATED BRADY/GIGLIO? (STATED BY APPELLEE).

Lamarca contends that his defense attorneys were ineffective for failing to call James Zaccagnino as a witness to counter the testimony of James Hughes. The trial court rejected this claim below, stating, in part:

> At the hearing on June 27, 2003, Mr. Eide clarified that he chose not to call Zaccagnino as a witness for two reasons: 1) Zaccagnino has hearing difficulties; and 2) during his interview with Mr. Eide in the county jail prior to trial, Zaccagnino could not unequivocally testify that he was in the

> "yard" within hearing distance when the defendant made the statements -- in other words, the defendant may have made the statement; Zaccagnino was just not there to hear it. [Pages 66-67]. Mr. Eide also indicated that he was concerned with any mention, at trial, of "prison yard." Moreover, he was concerned that Zaccagnino's prior criminal history would render him unreliable as a witness.
>
> At the evidentiary hearing, Zaccagnino had difficulty hearing the first question that was asked of him. In fact, he answered it incorrectly. [Transcript from May 30, 2003: Pages 23-34]. Moreover, Zaccagnino is a long-time friend to the defendant, and is a convicted felon serving a life sentence. Because Mr. Eide's tactical decision not to call Zaccagnino as a witness was well within the range of prevailing professional standards, and because CCRC has failed to show that the outcome would have been different had Zaccagnino testified, this claim must fail under Strickland and its progeny. Remeta v. Dugger, 622 So. 2d 452, 455 (Fla. 1993)(counsel's strategic decisions will not be second guessed on collateral attack). (V-3, 368)

Zaccagnino never told Eide "that Hughes told him he was making that [the threat to kill Kevin] up." (R-4, 541). Although Lamarca thought Zaccagnino would be a good witness, Eide disagreed: He was a "convicted felon," "hard of hearing" and indicated that "he may not have heard what was said at the time" and "wasn't worth losing my closing argument." (R-5, 648). Appellant incorrectly asserts "[c]ounsel never fully investigated Mr. Zaccinino." (Appellant's Brief at 50). As the trial court noted below, Eide's decision not to call Zaccagnino was a tactical one. It was not a decision borne out of ignorance or a failure to investigate. As such, it is almost immune from post-conviction attack.

Within his assertion of ineffective assistance of counsel, appellant claims the State presented false testimony from Hughes. However, the defense did not show that James Hughes testimony was false. They simply presented a long time prison pal of Lamarca's, Zaccagnino, to testify on Lamarca's behalf. A factual dispute among witnesses does not establish that James Hughes' testimony was false. A fact recognized by the trial court in denying this claim below: "The court is not willing to find that the State permitted the false testimony of Hughes simply because Zaccagnino, a convicted felon, maintains that Hughes was lying. Hence, the Brady and Giglio claim are denied as CCRC failed to meet its burden of proof." (R-3, 369). This credibility determination was within the province of the trial court below.

Appellant next asserts that the State failed to disclose some type of deal with witness James Hughes which violated Brady v. Maryland, 373 U.S. 83 (1963). (Appellant's Brief at 54). The trial court rejected this claim below, stating:

> ...At the evidentiary hearing, John Burns, an Assistant State Attorney from Charlotte County, testified that Hughes had pending charges out of that county at the time of the investigation and trial in this case. Burns, testifying from his progress notes about the case (see Defense Exhibits #4 and #5), testified that the defendant received a downward departure sentence even though no promises were made by the State (i.e., note dated November 25, 1997). Burns explained that Hughes' public defender, Mr. Cooper, cited Hughes' cooperation in the present case

> to receive the mitigated departure (substantial cooperation with law enforcement). Although there were references to possibly qualifying and sentencing Hughes as a habitual felony offender (i.e., emails to Mr. Delassandro, the State Attorney), Burns explained that although a defendant meets the statewide criteria for habitualization, one is not sentenced as such unless he or she qualifies under the office's internal policy enacted by the elected state attorney. Burns was unequivocal in his testimony that he never contacted anyone in the Sixth Circuit about an agreement, and that no promises were ever made to Hughes. Judge Sean Crane testified to the same effect. Because CCRC failed to meet its burden of proving that Hughes received anything of benefit in exchange for his testimony, this aspect of the claim is hereby denied. (R-3, 369)

Appellant hints at something sinister in his brief, that the State must have had a deal to help Hughes, or, he likely would have been sentenced as a habitual felony offender. As the trial court found, however, Hughes did not meet the state attorney's office's internal guidelines for habitual offender treatment. (R-5, 687-88). At no point did anyone in the Pinellas State Attorney's Office contact Burns and ask him to give Hughes any consideration "whatsoever." (R-5, 685). Hughes scored in the prison range, 40.5 months to 67.5 months. (R-5, 674). Ultimately, after Hughes testified in the Lamarca case, the file reflected that ASA Kershey spoke to Shawn Crane who verified that Hughes had indeed testified. However, the file noted that he was not given any promises by the State. (R-5, 684-85). In November and December [Lamarca's trial] Hughes' defense attorney, Cooper, was still attempting to negotiate a plea. (R-

5, 685).

Hughes testimony that he received no benefit nor had any deal with the State was true at the time he testified at trial. Indeed, there was never any agreement or deal with Hughes. (R-6, 820). Judge Crane noted that in Hughes' deposition, he stated that he hoped to get a benefit from testifying and that the State had already offered him 42 months. (R-6, 828). However, Judge Crane testified unequivocally that there was no deal or agreement with Hughes. (R-6, 829).

The fact that Hughes defense attorney used his cooperation, after Lamarca's trial ended, in an effort to negotiate a below guidelines sentence, does not establish that any false testimony was presented. Simply put, appellant failed to establish that there was an undisclosed agreement at the time Hughes testified or that any of his testimony was false. As such, his claim must fail. See Tompkins v. Moore, 193 F.3d 1327, 1340 (11th Cir. 1999) ("Tompkins has failed to meet the threshold requirement that he show false testimony was used.").

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN DENYING LAMARCA'S CLAIM THAT HIS ATTORNEYS WERE INEFFECTIVE FOR FAILING TO CALL STEVE SLACK TO REBUT THE TESTIMONY OF TONYA LAMARCA? (STATED BY APPELLEE).

Appellant next asserts that his trial defense attorneys were ineffective for failing to call Steve Slack to impeach Tonya.

This claim largely duplicates his argument under Issue III above, asserting that defense counsel was ineffective in impeaching Tonya. Appellant's argument is repetitive and no more viable here than it was under Issue III.

The trial court denied relief on this claim after hearing testimony from appellant's defense attorneys and Steve Slack during the evidentiary hearing below. In denying this claim, the trial court stated in part:

> In the end, Mr. Eide made a tactical decision not to call Slack based on credibility, based on the fact that he was drinking heavily that night, and based on the fact that he could have been impeached by Detective Madden and/or Detective Morrison. [Transcript from June 27, 2003: Pages 74-75]. The court finds that Mr. Eide's explanation was well within the range of prevailing professional standards. Moreover, CCRC has failed to show, as required by Strickland, that Mr. Eide's tactical decision not to call Slack was deficient. Spencer v. State, 842 So. 2d 52, 62 (Fla. 2003)("This court has held that defense counsel's strategic choices do not constitute deficient conduct if alternative courses of action have been considered and rejected.").
>
> (V-3, 371-72)

The trial court thoroughly analyzed the testimony provided during the evidentiary hearing and concluded that defense counsel made a reasonable tactical decision not to call Steve Slack. Since trial defense counsel investigated the witness, decided not to call him, and provided a rationale for his decision, his decision is almost immune from post-conviction challenge. Strickland, 466 U.S. at 690-91 ("Strategic choices

made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable").

As Eide recognized, Slack could offer some potentially damaging testimony. Slack had been drinking, testified that Lamarca was mad or upset when he left the bar prior to the murder, and that Tonya was upset when she returned to the bar. (V-11, 1528). In addition to noting that Tonya was upset, Tonya said that appellant had raped Tina.[21] (V-5, 659). Moreover, Slack apparently told Detective Madden that Tonya did tell him she had been raped, and Eide was aware the State might call him in rebuttal. (V-5, 649-50; V-11, 1529). Eide had ample reason not to call Steve Slack. The trial court's ruling should be affirmed on appeal.

ISSUE IX

WHETHER THE STATE WITHHELD EVIDENCE OF A DEAL WITH WITNESS SMITH IN VIOLATION OF BRADY AND PRESENTED FALSE TESTIMONY UNDER GIGLIO. (STATED BY APPELLEE).

The trial court rejected appellant's claim that Brady and Giglio were violated when Jeremy Smith testified below that he received no deal or benefit for testifying against Lamarca. (Appellant's Brief at 58). The trial court rejected appellant's claim below, stating, in part:

The transcript from the March 22, 1996 hearing

[21]The defense would certainly want to prevent the jury from learning that appellant raped his other daughter, Tina.

(State's Exhibit #15B) reflects that Judge Crane testified that that Jeremy Smith had cooperated in the investigation by giving a statement but that the trial was not scheduled anytime soon. Judge Crane unequivocally indicated that no promises were made of any kind in exchange for Jeremy Smith's cooperation, and that there were no "winks of the eye." Because the trial had not yet occurred, Judge Villanti was unwilling to depart at that time. Furthermore, Judge Villanti did not commit to a downward departure sentence for the future, but stated that Judge Im could reargue his case at a later time. Thereafter, Judge Im successfully obtained a continuance to determine if a plea agreement could be negotiated. Jeremy Smith was subsequently sentenced in March 1996 to 29 months prison, which was a guidelines disposition.

With Defense Exhibit #7 in hand, CCRC questioned Judge Crane at the hearing as to whether there were any promises made in exchange for Jeremy Smith's testimony. Judge Crane categorically denied that there were any deals, promises, or "winks of the eye." In this regard, Judge Crane's testimony was confirmed by the transcript of the March 22, 1996 hearing. Judge Crane further explained that he did not recall the message left by Florence Smith, but that even though the message was left, there were never any promises or deals made.

CCRC has failed to show that there were any promises made to Jeremy Smith. Moreover, CCRC has failed to show that the State withheld any evidence of a "deal" between the State and Jeremy Smith. Wright v. State, 581 So. 2d 882, 883, 887 (Fla. 1991) (affirming that "speculative" claim under Brady does not warrant relief). Finally, CCRC has failed under Giglio to demonstrate that the State permitted false testimony by allowing Jeremy Smith to testify at trial that he had received no deals or benefits in exchange for his testimony. Ventura v. State, 794 So. 2d 553, 562 564 (Fla. 2001). Accordingly, this claim is denied. (R-3, 373-374)

Curiously, Lamarca begins his argument under this issue by making an unrelated assertion that it was impossible for Jeremy Smith to have given clothes to appellant because of their

disparity in size. (Appellant's Brief at 58). As support for this proposition he cites police reports which he contends show the disparity in size between Lamarca and Smith. The problem with appellant's argument is that Jeremy Smith testified at trial that he did not know whose clothes he provided to the appellant.[22] When asked whose clothes he gave to the appellant, Smith responded: "I don't remember. There was a lot of clothes at the house." (TR. 950). Thus, appellant's first argument on this point is not only irrelevant to the Brady/Giglio claim, it is also patently without merit.

As the trial court held below there was no undisclosed "deal" or agreement with Jeremy Smith. Smith received a guidelines sentence. Prosecutor Crane simply made a short factual statement at Smith's sentencing noting his cooperation in the Lamarca case.[23] See McCleskey v. Kemp, 753 F.2d 877, 883-84 (11th Cir. 1985)(where the court held that a detective's statement that he would speak a "word" on the witnesses behalf regarding pending charges fell far short of the type of "understanding" contemplated in Giglio). The trial court

[22]Smith testified he was staying at a house owned by John Ehrke and his girlfriend. (TR. 932).

[23]Mr. Martin noted that Smith's deposition revealed that he hoped someone would speak on his behalf: "That's clearly what Mr. Smith said in his deposition to Mr. Eide, that law enforcement indicated that they would tell somebody that he cooperated. I believe that's clearly in the deposition that Mr. Eide took." (R-7, 887).

reviewed the transcript of that hearing and confirmed that their was no benefit, deal, no "winks" regarding the disposition of Smith's charge. Testimony from the hearing below and the transcript of the Pasco sentencing confirms that there was no deal made in exchange for Smith's cooperation.[24] (SR-1, pgs. 6-19). See Tarver v. Hopper, 169 F.3d 710 (11th Cir. 1999)(where prosecutor testified that there was no deal in exchange for witness's testimony and statement that witness's testimony "would be taken into consideration" on pending charges was "too preliminary and ambiguous to require disclosure.").

However, assuming, *arguendo*, that some form of Brady violation can be inferred from Smith's testimony, there was no reasonable probability of a different result. Smith had already been sentenced at the time he testified, was impeached by the defense on the basis of his conviction, his drug usage, and the fact he sought favorable treatment on his violation of probation charge. Smith made a full statement to the police prior to the assistant state attorney notifying the sentencing court of his cooperation. Moreover, Smith had already served his sentence at

[24]Smith correctly testified that he received absolutely no benefit in exchange for his testimony. No charges were dropped or reduced and he received a "29 month" sentence on the violation of probation charge. (V-5, 725-26). Although the defense argued for a departure sentence and house arrest, citing his cooperation, the prosecutor assigned to the case objected. (V-5, 721-22). He was ultimately offered a guidelines sentence of 29 months. (SR-1, pgs. 6-19).

the time of appellant's trial. (V-5, 729). Consequently, Smith had no motivation at the time of trial to skew his testimony in the State's favor. See State v. Lewis, 838 So. 2d 1102 (Fla. 2002) (even assuming the State failed to disclose potential impeachment evidence, given the limited value of this evidence, and, the fact testifying witness had already been sentenced, and any motivation for skewing his testimony would have been limited, there was no reasonable probability of a different result).

ISSUE X

WHETHER LAMARCA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO OFFER EXPERT TESTIMONY ON THE LACK OF GENETIC MATERIAL FROM THE SCENE OF THE SEXUAL BATTERY UPON TONYA LAMARCA? (STATED BY APPELLEE).

Appellant again asserts that trial defense counsel should have called a forensic expert to impeach the testimony of Tonya Lamarca regarding the absence of physical evidence of rape. This issue essentially repeats his earlier allegation of ineffective assistance under Issue III above. As argued above, the issue lacks any merit.

Appellant incorrectly asserts that evidence collected from the scene of the rape and tests upon Tonya Lamarca all "came back negative or inconclusive."[25] (Appellant's Brief at 61). In

[25]Once again, appellant's argument is entirely devoid of record cites.

fact, there was physical evidence of rape, corroborating Tonya's testimony. Genetic material from saliva taken from Tonya's left breast was consistent with a mixture between appellant's and Tonya's genetic profile. (V-3, 433-34). The chance of anyone at random having this profile was "approximately one in 390."[26] (V-3, 435). Thus, if Ms. Livingston were called to testify, she would have provided strong evidence to corroborate a sexual battery. Her testimony showed that it is highly likely appellant's saliva was on Tonya's breast. Moreover, the S.A.V.E. examination revealed "fresh injuries" to Tonya, redness in the vaginal and anal areas. (V-5, 594-95). Eide also noted that there was some evidence of strangulation, consistent with Tonya's claim that Lamarca grabbed her around the neck, kicked in the door, and dragged her inside the house. (V-5, 595). Thus, appellant's assertion that the State presented false evidence of "rape" is unsupported by the record.[27] Tonya's testimony was credible and supported by physical evidence.

The trial court rejected this claim below, stating, in part:

> ...Ms. Livingston explained that her testing revealed that the saliva from the swab of Tonya Flynn's face belonged to Tonya Flynn, and that the saliva from the swab of her breast was deposited by more than one donor. Ms. Livingston explained that Tonya Flynn and

[26]In other words, you have a .00256... [1/390] chance of finding someone with that genetic make up in the general population.
[27]Appellant apparently believes there can be no sexual assault without a semen deposit, a contention without support in the law or common sense.

> the defendant were both possible donors of the saliva from the swab of the breast, but that Kevin and Jasmine Flynn were conclusively eliminated as donors.
>
> As previously mentioned, a review of closing arguments reflects that Mr. Eide extensively argued the lack of DNA evidence surrounding the sexual battery (see analysis under claim (3).). In conclusion, the court is unable to conclude that Mr. Eide was deficient under Strickland in failing to call an expert, such as Ms. Livingston. Moreover, given the extensive argument by Mr. Eide on the lack of DNA evidence during closing arguments, the court cannot conclude that the defendant was prejudiced by the failure of Mr. Eide to call an expert on this issue.
>
> (R-3, 375)

As the trial court noted above, Eide argued the lack of corroboration for the rape in closing argument to the jury. Moreover, while Ms. Livingston could testify she did not find Lamarca's semen on Tonya or the bed sheets, her testimony on saliva and genetic testing provided support for Tonya's assertion that Lamarca sexually assaulted her. Eide clearly made a reasonable tactical decision not to present such testimony. See Kenon v. State, 855 So. 2d 654, 656 (Fla. 1st DCA 2003)("Absent extraordinary circumstances, strategic or tactical decisions by trial counsel are not grounds for ineffective assistance of counsel claims.")(cited with approval in Brown v. State, 29 Fla. L. Weekly S764 (Fla., December 2, 2004)). Even with the benefit of prohibited "20/20" hindsight, the decision appears reasonable. As such, appellant' s claim of ineffective assistance must fail.

ISSUE XI

WHETHER TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE? (STATED BY APPELLEE).

Appellant next argues that his defense attorneys were ineffective in failing to prepare for the penalty phase of his trial. The State disagrees.

The trial court provided a thorough analysis of this issue in denying this claim below. The trial court stated, in part:

> ...The record corroborates Mrs. McClure's testimony that the defendant, from the inception of the case, expressed his intention to waive mitigation. The record abundantly demonstrates that Mrs. McClure began preparing for the penalty phase many months prior to trial. The proffered evidence at the penalty phase and the exhibits provided by the State corroborate this fact. Accordingly, this claim is without merit. (R-3, 375)
>
> . . .
>
> After considering the foregoing, the court finds that CCRC has failed, in every respect, to show that Mrs. McClure was not prepared for the penalty phase. To the contrary, the record evidence and testimony reflects that counsel was indeed prepared for the penalty phase. As previously explained (see (4).), Mrs. McClure testified that she initially ignored the defendant's expressed desire to waive mitigation, and that she proceeded as if she would be responsible for presenting mitigation. Mrs. McClure retained Dr. Maher to determine the defendant's competency. She subsequently contacted Dr. Caddy in anticipation of the penalty phase. That CCRC has come forward with additional testimony that could have been presented in mitigation is irrelevant, for the record abundantly demonstrates that the defendant did not permit the presentation of mitigation. As CCRC has failed to show deficient performance under Strickland, this claim is denied. (V-3, 377-78)

It is undisputed that Lamarca did not want counsel to

present any evidence or argument, rebut anything, or make any effort to spare his life (S-R, 21). Lamarca chose to exercise his right to represent himself during the penalty phase and he waived his right to present mitigating evidence (T-32, 4-12, 25-28).

Amazingly, appellant now asserts his defense attorneys were ineffective in failing to prepare for and, presumably, present evidence during the penalty phase. The fact that appellant chose, against the advice of counsel, to waive presentation of mitigating evidence should preclude appellant from raising an allegation that his defense attorneys were ineffective for failing to prepare for the penalty phase. Downs v. State, 740 So. 2d 506 (Fla. 1999) (where defendant waived his right to representation during the resentencing proceeding and counsel was appointed as "stand-by" counsel only he may not complain of counsel's failure to present mitigating evidence); Goode v. State, 403 So. 2d 931 (Fla. 1981) (where defendant acted as his own attorney and could not later complain that his "co-counsel" ineffectively "co-represented" him). Appellant did not want a penalty phase, communicated his intention to his attorneys early on in this case, and, frustrated their attempts to prepare for the penalty phase.

Pursuant to Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) defense counsel proffered to the Court evidence that they were

prepared to present to the jury as mitigating circumstances but for being instructed by the Defendant not to do so. (T-32, 15-24). Included in defense counsel's proffer was reference to potential testimony from Lori Galloway, Lamarca's father, and Dr. Glen Caddy. Reference was also made to appellant's allegedly positive traits. The State then proffered its rebuttal. (T-32, 15-24).

Once again, appellant fails to provide any record cites for his recitation of facts and fails to recognize, much less address, the trial court's order denying relief. Appellant's contention that the defense attorneys failed to effectively investigate mitigation until after the guilt phase (Appellant's Brief at 79-90), is not supported by the record. As found by the trial court, Ms. McClure began investigating potential penalty phase witnesses early on in the case even though appellant made it very clear he did not want any mitigation presented if he was convicted. Ms. McClure prepared for the penalty phase the same as she would in any other capital case. (V-8, 1146).

Ms. McClure sought permission from appellant to interview his family and put on testimony. He did not want any family member present during trial and did not want either his father or sister to testify during the penalty phase. (V-8, 1180). It is quite clear that Lamarca was exercising his right to control

the scope and content of counsel's penalty phase investigation.[28] See Boyd v. State, 30 Fla. L. Weekly S87 (Fla., February 10, 2005)("Whether a defendant is represented by counsel or is proceeding pro se, the defendant has the right to choose what evidence, if any, the defense will present during the penalty phase.")(citing Grim v. State, 841 So. 2d 455, 461 (Fla.), cert. denied, 540 U.S. 892, 124 S.Ct. 230, 157 L. Ed. 2d 166 (2003)); Mora v. State, 814 So. 2d 322, 332 (Fla. 2002)("...Mora was adequately advised of his ability to present the mitigating evidence from his family members, and his decision not to have Malnick [defense counsel] disturb these relatives under the circumstances of this case should have been respected."). Indeed, when counsel ignored Lamarca's position and brought his father and sister to court during trial, Lamarca became furious. Ms. McClure testified: "...[H]e was furious at me because I had dragged his father and his sister to the courtroom during his trial in an attempt to get them to convince him to let them testify in the second phase." (V-9, 1325). Ms. McClure made contact with Lori Lamarca but Lori told her she was going to

[28]Counsel's failure to contact his brother was not deficient performance. Appellant told them his brother was insane and that their remained an adverse relationship between the two at the time of trial. See Strickland, 466 U.S. at 691, 104 S.Ct. at 2052 ("[W]hen 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.").

honor appellant's wishes and refused to come to court. (V-8, 1190-91).

Thus, it is clear that appellant not only instructed his defense attorneys not to contact witnesses in preparation for the penalty phase, but that he also instructed his family members not to cooperate.[29] See Power v. State, 886 So. 2d 952, 961 (Fla. 2004) ("where there is proof that counsel spent substantial effort on the case and was familiar with the mitigation, but also evidence that Power himself interfered with trial counsel's ability to obtain and present mitigating evidence, this Court will not overrule a trial court's conclusion that counsel's performance was not deficient."); Rutherford v. State, 727 So. 2d 216 (Fla. 1998)(rejecting ineffective counsel claim where defendant placed restrictions on what evidence counsel could present during the penalty phase).

The defense attorneys did not ignore potential mental health issues. Ms. McClure retained Dr. Maher for a psychiatric evaluation of appellant. (V-9, 1308). Dr. Maher saw appellant on June 11, 1997. (V-9, 1308). Dr. Maher could have provided some useful mitigation, that appellant suffered from PTSD and

[29]Lori Lamarca was contacted but at appellant's direction, made it clear that she "wasn't going to cooperate with us." (V-8, 1188). Other family members like Angela and appellant's father were contacted but "wouldn't give us anything." (V-8, 1191). Angela was contacted but refused to cooperate in any way. (V-8, 1195). Mark Brown was contacted and if allowed to do so, was ready to testify in the penalty phase. (V-8, 1197).

some "non-statutory" mental health mitigation. (V-8, 1153). Again, however, the record makes it very clear that appellant did not want a penalty phase and interfered with his attorneys' preparation. Despite this interference, Ms. McClure tried to prepare for the penalty phase in the hope that appellant would change his mind.

Ms. Furtick, a social worker, does not provide any reason to question counsel's effectiveness. Her testimony regarding petitioner's background was unremarkable. There was no history of appellant being abused or other potentially significant mitigation revealed through her testimony. Moreover, appellant was informed that his attorneys were prepared to present the testimony of family members in the penalty phase if he did not waive presentation of mitigating evidence.[30] See State's Exhibit 20. (SR-2).

As for not presenting Dr. Caddy, defense counsel consulted with Dr. Caddy prior to the penalty phase. Appellant was aware that he could provide potentially mitigating testimony. Indeed,

[30]Appellant's reliance on Wiggins v. Smith, 539 U.S. 510 (2003), to support his claim that counsel was ineffective is misplaced. In Wiggins, counsel had failed to investigate and discover evidence that Wiggins suffered severe "abuse" and "privation" in the first six years of his life, in custody of an alcoholic, absentee mother. Moreover, "[h]e suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." 539 U.S. at 535. Appellant's family history and background is unremarkable in comparison. And, in this case, unlike Wiggins, appellant precluded his defense attorneys from presenting mitigating evidence.

Dr. Caddy was mentioned in defense counsel's oral proffer pursuant to Koon. Nonetheless, testimony during the evidentiary hearing below established that offering Dr. Caddy's testimony during the penalty phase might, in fact, have been ill advised.

First, according to Ms. McClure, appellant admitted that he killed the victim to Dr. Caddy. (V-8, 1168, 1171, 1495). Moreover, Dr. Caddy testified that appellant was a very dangerous man. If he was "messed with" "he would truly and gravely hurt somebody and seek to kill them with his hands. And not on the third or fourth hit, but within several strikes." (V-8, 1049). In 1996, he was of the opinion that "Anthony had the potential to be fatally dangerous to somebody." (V-8, 1050-51). And, that over the years he has been relatively safe in prison "because he's built a reputation of being so dangerous that even the guards give him wide berth." (V-8, 1057). It would also be revealed through Dr. Caddy that appellant acknowledged some type of sexual contact with both of his daughters [allegation he raped Tina, claim of consensual sex with Tonya]. (V-8, 1121).[31] On balance, Dr. Caddy's testimony provided little benefit to the defense in mitigation.[32] And, it

[31]Evidently, appellant implicated himself in another murder in his interview with Dr. Caddy. (V-9, 1340).

[32]Moreover, his testimony was countered by Dr. Merin, who found appellant was an antisocial type personality, lacked empathy, was impulsive and tended not to follow society's rules. (V-10, 1392, 1408). In Dr. Merin's opinion, appellant did not suffer from post-traumatic stress. (V-10, 1380-81).

was appellant's decision below which prevented Dr. Caddy from testifying, not the allegedly deficient performance of defense counsel.

Aside from failing to show deficient performance, appellant has completely failed in his burden of proving prejudice. Since appellant precluded defense counsel from presenting any evidence in mitigation, the asserted deficiencies in counsel's penalty phase preparation could not, and, would not have affected the outcome in this case. Appellant had a constitutional right to control his own destiny. Faretta v. California, 422 U.S. 806 (1975); Hamblen v. State, 527 So. 2d 800, 804 (Fla. 1988)("in the final analysis, all competent defendants have a right to control their own destinies").

In sum, appellant received the penalty phase he desired. He cannot fault counsel for failing to present evidence which he himself, directed counsel not to pursue or present on his behalf.

ISSUE XII

WHETHER APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT IS BASED UPON A SINGLE AGGRAVATING CIRCUMSTANCE? (STATED BY APPELLEE).

The trial court correctly found this issue procedurally barred from review in appellant's motion for post-conviction relief. This is an issue which should have been raised, if at

all, on direct appeal.[33] Indeed, appellant did claim his death sentence was not proportional because it rested on only one aggravator, prior violent felony conviction. [sexual battery and kidnapping]. Appellant may not litigate the same issue in his motion for post-conviction relief. See Maharaj v. State, 684 So. 2d 726 (Fla. 1996)(Post-conviction relief petitioner's claims which were either raised or could have been raised on direct appeal were properly denied without an evidentiary hearing).

ISSUES XIII AND XIV

WHETHER THE STATE PROPERLY PRESENTED THE FACT THAT APPELLANT USED A KNIFE DURING HIS PRIOR KIDNAPPING AND ATTEMPTED SEXUAL BATTERY OFFENSES? (STATED BY APPELLEE).

Lamarca contends that it was improper for the State to argue and the court below to consider his prior violent felony conviction for kidnapping with a knife. However, this challenge to the prior conviction should have been raised, if at all, on direct appeal. Sireci v. State, 773 So. 2d 34, 44 (Fla.

[33]The fact that Lamarca's death sentence is supported by a single aggravating factor does not mandate reversal of the death penalty imposed in this case. Under § 921.141(2), Florida Statutes, death may be the appropriate recommendation if at least one statutory aggravating factor is established. After an aggravator has been established, any mitigating circumstances established by the evidence must be weighed against the aggravating factor. See, Gamble v. State, 659 So. 2d 242 (Fla. 1995), citing Dougan v. State, 595 So. 2d 1, 4 (Fla.), cert. denied, 506 U.S. 942 (1992).

2000)(stating that challenge to prior conviction should have been raised on direct appeal). The issue is procedurally barred from being litigated in a motion for postconviction relief. In any case, the issue lacks any merit.

Appellant was properly convicted of armed sexual battery and armed kidnapping. However, the Third District found the sentencing enhancement to a life felony improper, where the "trial court in its charge to the jury failed to explain the jury's obligation to make a finding as to whether or not weapon was used, failed to define the use of a weapon as an element of the crime and failed to explain the effect of such a finding or lack thereof in terms of degree or penalty." Lamarca v. State, 515 So. 2d 309, 310 (Fla. 3d DCA 1987). Thus, it was only the sentencing enhancement, not appellant's convictions which were disturbed on appeal.

The trial court recognized this distinction in denying this claim below. (V-3, 378). Appellant failed to present any evidence below to indicate that he was not armed with a knife during his prior violent felony convictions for kidnapping and attempted sexual battery. Consequently, the trial court's ruling should be affirmed.

ISSUE XV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO REMOVE THE PROSECUTOR FROM THE CASE AFTER HE WAS LISTED AS A POTENTIAL WITNESS FOR THE

POSTCONVICTION HEARING? (STATED BY APPELLEE).

Appellant's assertion that the trial court erred in failing to remove the prosecutor after he was listed as a witness is without merit.[34] It was the appellant, not the State, who called prosecutor Martin to testify during the postconviction hearing. In Scott v. State, 717 So. 2d 908, 910 (Fla. 1998), this Court rejected an argument that the prosecutor should be removed under these exact circumstances, stating:

> While Rule Regulating the Florida Bar 4-3.7 prohibits a lawyer from acting as an advocate and witness in the same trial, [note omitted] a purpose of the rule is to prevent the evils that arise when a lawyer dons the hats of both an advocate and witness for his or her own client. Such a dual role can prejudice the opposing side or create a conflict of interest. These concerns are not implicated in the present case where the state attorney was called as a witness for the other side on a Brady claim in a postconviction evidentiary hearing before a judge.

(footnotes omitted). As this Court noted, "[t]o hold otherwise on this issue would bar many trial level prosecutors--who may be the most qualified and best prepared advocates for the State--from representing the State in a Brady claim in a subsequent postconviction evidentiary hearing." Scott, 717 So. 2d at 910-11. Appellant's claim should be denied.

[34]A court's decision to allow the prosecutor to testify during trial is reviewed on appeal for an abuse of discretion. See Occhicone v. State, 768 So. 2d 1037, 1040 (Fla. 2000).

ISSUE XVI

WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH WITNESS JEREMY SMITH WITH A PRIOR MISDEMEANOR RETAIL THEFT CONVICTION? (STATED BY APPELLEE).

Appellant maintains that his defense attorneys were ineffective for failing to impeach witness Jeremy Smith with a misdemeanor retail theft conviction. The trial court denied this claim below, stating, in part:

> ...Although CCRC failed to address this claim at the evidentiary hearing, Defense Exhibit #10 is a copy of the Criminal Justice Information System Docket Screen, which does reflect an adjudication of guilt for a misdemeanor retail theft conviction in CTC95-O7971MMANO. Nevertheless, the defendant has failed to show how he was prejudiced by Mr. Eide's failure to elicit testimony concerning the misdemeanor theft conviction, as required under Strickland. The fact of the matter is that Smith was already impeached on the basis of his prior criminal history. The additional mention of a misdemeanor conviction would have had little to no effect in further undermining Smith's credibility. (R-3, 372)

The record reflects that Smith's credibility was impeached with his prior felony conviction and his extensive drug use. Counsel cannot be considered ineffective for failing to uncover and use a prior misdemeanor conviction. The prior conviction simply does not represent significant impeachment evidence. Appellant has failed to establish either deficient performance or prejudice under Strickland.

ISSUE XVII

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO EFFECTIVELY INVESTIGATE AND CROSS-EXAMINATION THE STATE'S BALLISTIC EXPERT? (STATED BY APPELLEE).

Appellant failed to present any evidence below to support his claim that his defense attorneys were ineffective for failing to investigate or effectively cross-examine the State's ballistics expert. Consequently, the trial court summarily denied this claim at the close of evidence below. (R-2, 223). The trial court's ruling should be affirmed on appeal.

Appellant did not offer the testimony of a ballistics expert below. Moreover, the lack of residue on the passenger's side of the car was not exculpatory. As defense counsel Eide testified below, this was the same car appellant drove back to the bar from his trailer (the murder scene) to pick up Tonya. Gunshot residue on the driver's side of the car appellant was driving immediately after the murder would not, as Eide recognized, impeach Tonya. (R-5, 599-600). Instead, it could very well be viewed as incriminating evidence. Thus, this claim was properly denied below.

CONCLUSION

Based on the foregoing arguments and authorities, the State asks this Honorable Court to affirm the denial of post-conviction relief in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail Peter J. Cannon and Daphney E. Gaylord, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619-1136, this ____ day of May, 2005.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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