IN THE SUPREME COURT OF FLORIDA

FRANK A. WALLS,

Appellant,

CASE NO. SC03-633

v.

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, FRANK A. WALLS, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The trial record will be referred to as trial record followed by the page number. (T at *). The evidentiary hearing testimony will be referred to as post conviction record followed by the page number. (PCR at *). The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

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

> During the early morning hours of July 22, 1987, in Okaloosa County, a neighbor heard loud noises coming from the mobile home of the victims, Edward Alger and Ann Peterson. When Alger failed to report for duty at Eglin Air Force Base, where he worked, his superior officer Sergeant John Calloway went to Alger's home. The body of a nude female was discovered in the front bedroom. Calloway left immediately to telephone police.
>
> When investigators arrived, they identified the woman as Peterson. She was lying face down on the floor of the front bedroom, shot twice in the head. Alger's nude body was found on the floor of the second bedroom. His feet were tied with a curtain cord and a piece of the same cord was tied to his left wrist. Alger had been shot three times and his throat cut.
>
> A warrant was obtained to search the mobile home where Walls lived with his roommate. The warrant was issued based primarily on information given to the investigators by Walls' former roommate, who lived in the mobile home adjacent to that of the victims. A number of items were seized during the search that were linked to the crime scene. Walls was charged with ten offenses. Some of these charges were dismissed or reduced to lesser offenses following Walls' motion for judgment of acquittal at the conclusion of the trial.
>
> Following his arrest, Walls gave a statement to the investigators detailing his involvement in the murders. In this confession, Walls indicated that he deliberately woke up the two victims by knocking over a fan after entering the house to commit a burglary. Then he forced Alger to lie on the floor and made Peterson tie him up so that his hands were "behind the back, ankles shackled." He next forced Peterson to lie on the floor so he could tie her up in the same manner.
>
> Walls stated that Alger later got loose from his bindings and attacked Walls. During the fight, Walls tackled Alger, forced him to the floor, and "caught [Alger] across the throat with the knife." Alger continued struggling with Walls and succeeded in biting him on the leg. At this point, Walls apparently dropped his knife. Walls then pulled out his gun and shot Alger several times in the head.
>
> Walls returned to Peterson. He found her "laying in there crying and everything, asked--asked me some questions." Walls said he could not understand what she was saying, so

he removed her gag. She asked if Alger was all right. Walls said:

I told her no. I told her what was going on, and I said, "I came in here, and I didn't want to hurt none of y'all. I didn't want to hurt you, but he attacked my ass, and things just happened.

Walls then untied Peterson, and "started wrestling around with her." During this second struggle, he ripped off Peterson's clothing. Walls' confession stated:

[Peterson] was like curled up crying like. I don't know, I guess I was paranoid and everything. I didn't want no, uh, no witnesses.

....

I--all I know is just--all I know I just went out, and I just pulled the trigger a couple of times right there behind her head.

....

I mean close range, I mean shit, it's got powder burns (unintelligible) and everything.

Walls stated that after the first shot, Peterson was "doing all kinds of screaming." He then forced her face into a pillow and shot her a second time in the head.

Walls pled not guilty and filed several pretrial motions, including a motion to determine his competency to stand trial. Five experts testified, three stating Walls was incompetent and two finding he was competent. The trial judge agreed with the latter two experts and held that Walls was competent to stand trial. The jury found Walls guilty of all charges submitted and later recommended life imprisonment for the murder of Alger and death for the murder of Peterson. The trial judge concurred. The conviction later was reversed and a new trial ordered. Walls v. State, 580 So.2d 131 (Fla.1991).

At the retrial, venue was moved from Okaloosa to Jackson County because of pretrial publicity. The State's guilt-phase case consisted primarily of the physical evidence, testimony by investigating officers, testimony by a pathologist, and Walls' taped confession, which was played for the jury. Walls chose to present no case in the guilt phase. The jury later found Walls guilty as charged. During the penalty phase, the defense presented a case that detailed Wall's considerable history of violent or threatening behavior, various emotional problems, and extensive treatment for the latter, including a stay in an Eckerd residential youth camp. A psychiatrist who had treated Walls when he was sixteen years old stated that he had placed Walls on the drug lithium carbonate to control his bipolar mood disorder (also called manic-depressive disorder). At some point, the psychiatrist said, Walls ceased taking the drug.

When asked if Walls had ever been under the influence of extreme mental or emotional disturbance, the psychiatrist stated:

He showed some severe difficulties with acting-out behavior. When you get to the point of pushing teachers, getting to the point of being placed in an [emotionally handicapped] class because you can't control your behavior, you have reached a point where you are having severe behavioral problems. I don't know that I would use the word extreme, but I would probably use the word severe.

....

I evaluated him at age 16, which was long before the murder took place, so I can't testify to what his state of mind was at the time that the murder took place.

However, the psychiatrist did agree that, at age sixteen, Walls understood right from wrong and legal from illegal behavior.

An expert psychologist stated that Walls' IQ actually had declined substantially during the years prior to the trial. This psychologist answered yes when asked whether "Walls' conduct was substantially impaired or impaired to any degree in July of 1987" (emphasis added), when the murder was committed.

After the penalty phase, the jury recommended the death penalty for the Peterson murder by a unanimous vote. The judge sentenced Walls to five years for burglary of a structure, twenty years for the armed burglary of a dwelling, twenty years each for two counts of kidnapping, and two months for petty theft. Walls again received a life sentence for the murder of Alger and death for the murder of Peterson.

The judge found six aggravating factors supporting the death penalty in this instance: (1) prior violent felony conviction (the contemporaneous murder of Alger); (2) murder committed during burglary or kidnapping; (3) murder committed to avoid lawful arrest; (4) murder committed for pecuniary gain; (5) the murder was heinous, atrocious, or cruel; and (6) the murder was cold, calculated, and premeditated.

The court found the following mitigating factors, but concluded that they were of insufficient weight to preclude the death penalty here: (1) Walls had no significant history of prior criminal activity; (2) Walls' age at the time of the crime (nineteen); (3) Walls had been classified as emotionally handicapped; (4) Walls had apparent brain dysfunction and brain damage; (5) Walls had a low IQ so that he functioned intellectually at about the age of twelve or thirteen; (6) Walls confessed and cooperated with law enforcement officers; (7) Walls had a loving relationship with his parents and a disabled sibling; (8) Walls was a good worker when employed; and (9) Walls had exhibited kindness toward weak, crippled, or helpless persons and animals. The trial court specifically rejected the existence of statutory mental mitigators.

Walls v. State, 641 So.2d 381, 384-386 (Fla.1994)(footnote omitted)

Walls appealed to the Florida Supreme Court, raising nine issues: 1)a potential juror should have been excused for cause during voir dire, or that the trial court should have granted an additional peremptory challenge to the defense to excuse the juror; 2) that two black jurors were excused by the State in violation of *State v. Neil*, 457 So.2d 481 (Fla.1984), and *State v. Slappy*, 522 So.2d 18 (Fla. 1988); 3)that jurors during his trial were kept in session for overtaxing hours; 4) errors in the penalty-phase jury instructions on aggravating and mitigating factors, including the aggravators of heinous, atrocious, or cruel, and cold calculated premeditation; 5) the trial court's refusal to provide a more detailed interpretation of emotional disturbance as a mitigating factor; 6) the trial court's findings on aggravating factors including HAC, CCP, during the commission of a burglary or kidnapping and the avoid arrest aggravator; 7) the trial court erred by requiring him to prove mitigating factors by a preponderance of the evidence; 8) the trial court improperly rejected expert opinion testimony that he was suffering extreme emotional disturbance and that his capacity to conform his conduct to the law's requirements was substantially impaired; and 9) proportionality. The Florida Supreme Court affirmed the conviction and sentence. *Walls v. State*, 641 So.2d 381 (Fla. 1994).

Walls filed a petition for writ of certiorari arguing (1) the Florida Supreme Court harmless error analysis of the CCP aggravator violated *Chapman v. California*, 386 U.S. 18, 24, 87

S.Ct. 824, 17 L.Ed.2d 705 (1967)); and (2) the HAC jury instruction was vague citing *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). The United States Supreme Court denied certiorari on January 23, 1995. *Walls v. Florida*, 513 U.S. 1130, 115 S.Ct. 943, 130 L.Ed.2d 887 (1995).

On March 17, 1997, Walls filed a motion to vacate judgment of conviction and sentence. (PCR. Vol I 1-40). On December 19, 2001, Walls filed an Second Amended Motion to vacate judgment of conviction and sentence raising 9 Claims including various subparts. (PCR Vol. II 199-268). On March 8, 2002, the Attorney General's office filed a response, agreeing to an evidentiary hearing on claim II but asserting that the remaining claims should be summarily denied. (Vol. II 273-307).

The trial court held a *Huff* hearing on May 20, 2002. (Vol. III 546-591). The trial court entered a written order following the *Huff* hearing on June 25, 2002. (Vol II 312-314). The trial court granted an evidentiary hearing on major parts of claim I, claim II, parts of III and denied an evidentiary hearing on the remaining part of claim III, claims IV, V, VI, VII and VIII. Claim III regarding the expert on the effects of Ritalin was denied with the reservation that collateral counsel could present additional evidence to establish prejudice at the evidentiary hearing. (PCR II 313).

The trial court held an evidentiary hearing on January 9, 2003. (PCR Vol. IV 592-725). The defendant testified at the evidentiary hearing. No post-evidentiary written memoranda were filed. The trial court entered an order denying post-conviction

relief on January 27, 2003. (Vol. III 448-532). In its order, the trial court noted:

> At the time of this trial, Mr. Loveless had been an Assistant Public Defender since 1977 and had represented numerous defendants as lead counsel in cases wherein the State was seeking the death penalty. Mr. Loveless possessed the experience and qualifications necessary to represent the defendant as lead counsel and was capable of developing and adhering to a trial strategy based on his years of trial experience. Further, W. Loveless had the benefit of the collaboration with penalty phase co-counsel, James Sewell, Esq., who at the time of this retrial was Chief Assistant Public Defender in 0kaloosa County with years of felony trial experience.

(PCR Vol. III 450-451).

SUMMARY OF ARGUMENT

ISSUE I

Walls asserts that the trial court improperly denied five claims of ineffectiveness of trial counsel following an evidentiary hearing.

Walls first argues his trial counsel was ineffective for failing to make a motion in limine to exclude references to the possible sexual battery of the murder victim and for failing to object to testimony relating to the possible sexual battery. Trial counsel was not ineffective. As the trial court found, this was part of the trial strategy. Furthermore, there was no prejudice. It was clear to the jury that no rape occurred.

Walls asserts that his attorney should have objected to the prosecutor's lack of remorse argument. The prosecutor's comment was fair rebuttal. While the prosecutor may not use lack of remorse as an aggravator, the prosecutor may rebut defense counsel's argument attempting to establish remorse as a mitigator.

Walls asserts asserts *Nixon v. Singletary*, 758 So.2d 618, 622 (Fla. 2000) by conceding guilt to the facts of felony murder. The State respectfully disagrees. *Nixon* does not apply where counsel conceded to the facts of felony murder but disputed premeditated murder. Counsel subjected the State's case to meaningful adversarial testing by contesting premeditated murder. *Strickland*, not *Cronic*, governs a partial concession.[1]

[1] *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984).

There is no prejudice. The jury found premeditated murder. The jury would have convicted Walls of first degree murder regardless of counsel's concession to felony murder. Moreover, even if *Nixon* applies to partial concessions, the requirement of an affirmative explicit acceptance was met in this case. As trial counsel testified at the evidentiary hearing, he obtained his client's consent to conceding to the facts of felony murder. This was a retrial. Counsel had made the same concession in the first trial and conceding was rediscussed with Walls prior to the second trial. Walls consented to this strategy as required by *Nixon III*. Thus, the trial court properly denied this claim of ineffectiveness.

Nor does *Nixon* apply to a concession to one aggravator. Counsel must concede that death is the appropriate penalty for *Nixon* to apply. *Strickland* applies to such a claim and Walls must establish prejudice as well as deficient performance. Conceding to the felony murder aggravator is not deficient performance. Counsel presented a wealth of mitigation to rebut this one aggravator.

Walls asserts that counsel was ineffective for failing to object to the prosecutor's comments. Counsel was not ineffective because

the prosecutor's comments were proper. Thus, the trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

ISSUE II

Walls asserts the trial court improperly denied him an evidentiary hearing on five claims. These claims are rebutted by the record. Thus, the trial court properly denied an evidentiary hearing on these claims.

ARGUMENT

ISSUE I

DID THE TRIAL COURT PROPERLY DENY THE CLAIM OF INEFFECTIVENESS ? (Restated)

Walls asserts that the trial court improperly denied five claims of ineffectiveness of trial counsel following an evidentiary hearing. Walls showed neither deficient performance nor prejudice. Thus, the trial court properly denied these claims of ineffectiveness following an evidentiary hearing.

The standard of review

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

EFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of trial counsel, a defendant must demonstrate that (1) counsel's performance was deficient and (2) there is a reasonable probability that the outcome of the proceeding would have been different. *Spencer v. State*, 842 So.2d 52, 61 (Fla. 2003)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). First, the defendant must show that

counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. In reviewing counsel's performance, the court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Spencer v. State*, 842 So.2d 52, 61 (Fla. 2003). The *Strickland* standard requires establishment of both prongs. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 ("[T]here is no reason for a court deciding an effective assistance claim ... to address both components of the inquiry if the defendant makes an insufficient showing on one.").

LEAD COUNSEL'S PRIOR EXPERIENCE

At the evidentiary hearing, lead counsel Mr. Loveless testified that by 1992, the time of the second trial of this case, he had tried 8 to 10 capital cases. (PCR IV 633). He had also been indirectly involved in several hundred capital cases. (PCR IV 634). He is qualified by the Florida Supreme Court to handle capital cases. (PCR IV 634). The jury recommendation in the first trial was life for the Alger murder and 7 to 5 for death for the Peterson murder. (PCR IV 634). Counsel was one vote away from a life recommendation in the Peterson murder. (PCR IV 635).

EVIDENCE OF THE RAPE KIT

Walls first argues his trial counsel was ineffective for failing to make a motion in limine to exclude references to the possible sexual battery of the murder victim and for failing to object to testimony relating to the possible sexual battery. Trial counsel was not ineffective. As the trial court found, this was part of the trial strategy. Furthermore, there was no prejudice. It was clear to the jury that no rape occurred. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

The trial court's ruling

The trial court ruled:

> As to the claim that defense counsel was deficient for failing to object to Jules Borio's testimony regarding a sexual battery kit used for the purpose of excluding the defendant as a contributor of blood on pieces of evidence, the trial transcript clearly demonstrates that it was made clear to the jury and the jury was well aware that pieces from the kit were used to take samples from the defendant to exclude him as a blood contributor on evidence; thus, the jury was aware of the purpose of the kit and they could not have inferred from the testimony that the defendant had committed an uncharged sexual battery.[2] As counsel testified during the evidentiary hearing, the jury was well aware of the purpose of the collection of samples from the defendant; thus, the failure to object to Jules Borio's testimony did not

[2] Testimony of Lonnie Ginsberg, FDLE forensic serologist, Record on Appeal, Vol. IV, P. 622-623, attached hereto as Exhibit "A", and Vol. IV, P. 629-630, attached hereto as Exhibit "B"; testimony of Dr. Edmund R Kielman, Record on Appeal, Vol. IV, P. 578, attached hereto as Exhibit "C"; testimony of Don Vinson, Record on Appeal, Vol. III, P. 486, attached hereto as Exhibit "D"; testimony of Jules Borio, Record on Appeal, Vol. III, P. 407, attached hereto as Exhibit "E"; and testimony of Larry Donaldson, Record on Appeal, Vol. III P. 495, attached hereto as Exhibit "F."

constitute deficient performance by defendant's trial counsel.

Likewise, trial counsel's failure to object to the defendant's taped statement or file a motion in limine concerning the statement was not deficient performance. The Court is satisfied that Mr. Loveless and Mr. Sewell chose not to move for a pre-trial motion in Limine or object at trial to the questions regarding a possible sexual battery for tactical reasons. Mr. Loveless and Mr. Sewell testified that they had developed a trial strategy which was to save the defendant's life. The taped confession of the defendant demonstrated their theory of defense, which was that the defendant did not break into the trailer for the purpose of killing the victims instead it was a "burglary gone bad."[3] During the confession, the defendant's confusion over whether or not a sexual battery had occurred, when it was made clear to the jury that a sexual battery had not in fact occurred, and the defendant's emotional distress demonstrated the defense's theory. As Mr. Sewell testified, the sexual battery questions posed during the defendant's confession were not an issue because there was never a question or an issue as to whether a rape occurred. Also, Mr. Sewell testified that the confession made by the defendant was a large part of the guilt and penalty phase strategy. The portion of the statement wherein the defendant is questioned regarding a potential sexual battery demonstrates that the defendant became confused, upset, emotional and remorseful. Mr. Sewell testified that he believed that the statement in its entirety showed remorse, confusion, and bolstered the defense theory that this was a "burglary gone awry." Furthermore, both Mr. Loveless and Mr. Sewell testified that their defense was very limited due to the confession and the physical evidence; thus, their only choice was to try to save the defendant's life through showing that the murders were not cold, calculated and planned. The taped statement of the defendant was played for the jury and during cross examination by Mr. Loveless testimony was elicited that the defendant was teary eyed and upset during the statement.[4] The decision to not object was not deficient performance but in fact a well reasoned tactical decision based on their years of experience. As to the decision not to file a motion in limine, as discussed above Mr. Loveless and Mr. Sewell both stated that they believed that the statement in its entirety helped prove the defense theory of the case; thus, they

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[3] Taped confession of the defendant, Record on Appeal, Vol. IV, P. 660-694; attached hereto as Exhibit "G."

[4] Trial testimony of witness Don Vinson, Record on Appeal, Vol. IV, P. 660-694, attached as exhibit “G”.

> did not file the motion. The defendant is now alleging that a letter from the Office of the State Attorney dated July 1, 1988 should have made Mr. Loveless aware of rape being an issue in the trial and Mr. Loveless should have reacted to the letter by filing a motion in limine to keep out all references of a possible sexual battery on Ann Peterson. However, a sexual battery charge was never filed against the defendant and it was not an issue in this trial. In fact, the letter itself referred to redacting inadmissible questions concerning the Gygi murder and an old rape investigation. The Court is satisfied that not reacting to this letter received by Mr. Loveless did not constitute ineffective assistance of counsel. Again, the defendant's trial counsel developed and adhered to a well reasoned trial strategy and dealt with the statement made by the defendant in a manner consistent with their strategy. The defendant has failed to established ineffective assistance of counsel.

(PCR III 451-453)(footnotes included but renumbered).

Trial

At trial, an evidence custodian with the Okaloosa Sheriff's office, Jules Borio, identified a number of photographs of the crime scene. (III 377-399). He also identified numerous other items of evidence. (III 402-409). One of the items referred to was a sexual battery kit. (III 407). At trial, the tape of Walls' confession was played for the jury. (IV 667-690). During the confession, Walls admitted that he ripped Ann's shirt off her. (IV 674). The officer asked Walls: when did you have sex with her? (IV 675). Walls responded: "I don't even know if I did that or not". Officer Vinson then asked Walls to think about it very, very carefully because she was a good looking woman who was now nude. Walls again answered that "I don't even know if I did that or not" and "[i]t could have been, I don't know." Officer Vinson then asked if Walls he had had sex with her would it be anal or vaginal sex and Walls responded that "I don't get into no anal sex." (IV 676). Officer Vinson then observed that

it would be vaginal and “more than likely” but he did not think that he had sex with her. Officer Vinson asked Walls if he went into the trailer for money or sex and Walls answered to get something and that he was flat broke. (IV 681-682).

Evidentiary hearing

At the evidentiary hearing, lead counsel, Chief APD Loveless, testified that the State had conceded that there was no evidentiary of sexual battery in this case. (PCR IV 610). He did not try to redact the portion of the defendant’s taped confession where the officers ask Walls if he raped the victim because it would become clear to the jury during the trial that there was no sexual battery. (PCR IV 611). Collateral counsel questioned lead counsel about a letter from the prosecutor referring to another murder and old rape investigation but collateral counsel admitted that no such evidence was admitted at trial. (PCR IV 613). Counsel felt that the officer asking the rape question was not a problem provided the answer came in as well because it increased his client’s credibility. (PCR IV 617). The evidence was clear to both sides at both trial that no sexual battery ever occurred.(PCR IV 619). In his opinion, the jury never considered it an issue. (PCR IV 620). He testified that it was a strategic decision not to object or make a motion in limine to redact that portion of the tape. (PCR IV 620). It was clear that the rape kit was used for blood testing. (PCR IV 648-649). The trial court asked a numerous of questions

regarding the prosecutor's letter. The trial court did not see the relevancy of the letter. (PCR IV 670-677).

Co-counsel, Assistant Public Defense, James Sewell, also testified. (PCR IV 681). Their theory was burglary gone awry and the tape showed Walls' remorse. (PCR IV 684). The rape was not an issue because there was no question that Walls had not committed sexual battery. (PCR IV 685). Walls was "sobbing, crying, remorseful and repentant" on the tape. (PCR IV 685). They wanted the whole tape in as part of their strategy. (PCR IV 688). It was clear to the jury that there was no sexual battery. (PCR IV 690).

It was not an issue at trial (PCR IV 703).

Merits

Counsel made the reasonable decision to use the entire tape of the defendant's confession as a basis for his burglary gone bad defense argument and to establish remorse as mitigation in closing of penalty rather than object. (VI 1003). Having the defendant deny the rape and then establishing that in fact no rape occurred increase his client's credibility. Furthermore, there is no prejudice because the State never implied that a rape had occurred nor disputed counsel's assertion that there was no rape. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

REMORSE

Walls asserts that his attorney should have objected to the prosecutor's lack of remorse argument. IB at 32. The prosecutor's comment was fair rebuttal. While the prosecutor may not use lack of remorse as an aggravator, the prosecutor may rebut defense counsel's argument attempting to establish remorse as a mitigator. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

The trial court's ruling

> Claim I also alleges ineffective assistance of counsel for failure to object to comments made during the prosecutor's closing arguments regarding the defendant's lack of remorse and the implication that Amy Touchton would have been killed by the defendant if she had become a witness.[5] As to the allegation that defense counsel was ineffective for failing to object to prosecutorial comments, regarding the defendant's lack of remorse, this arguinent was an invited response based on defense counsel's closing argument wherein trial counsel argued that the defendant was sobbing on the taped confession which demonstrated that the defendant's actions were not premeditated murder.[6] As an invited response, it was not improper argument by the prosecutor nor was it deficient performance for failing to object to the argument.
>
> As to the allegation that trial counsel should have objected to the prosecutor's implication that the defendant would have killed Amy Touchton if she had become a witness, defendant's trial counsel testified that they tried to maintain a "low-key" defense and made decisions not to overly object. Further, Mr. Loveless testified that he did not believe that this comment by the prosecutor hurt their defense. It is not ineffective assistance of counsel to conduct a low-key defense and it is a tactical decision to choose not to object to

[5] These allegations of ineffective assistance of counsel are subsections (4) and (5) of Claim I in the *Huff* hearing Order.

[6] Record on Appeal, Vol. V, P.727, attached hereto as Exhibit "H."

> objectionable closing arguments.[7] However, even if the failure to object to the prosecutor's comment was deficient performance, the defendant has failed to establish that he was prejudiced by the failure.

(PCR III 453-454)(footnotes included but renumbered).

Trial

During closing argument of the guilt phase, defense counsel argued that Walls was not a cold-blooded killer; rather, he was a caring person who showed his remorse by crying on his taped confession and who admitted his guilt. (T. V 727). The prosecutor responded by arguing Walls did not express his sorrow when he first encountered the officers; rather it was only after he knew he'd been caught that he started making statements. (T. V 730-731). The prosecutor also responded that Walls "did not care about those victims" and Walls "never once said he was sorry about them." (T. V 734). The prosecutor also rebutted defense counsel's argument by pointing out that Walls' statement that "this ruined my whole life" expressed concerned regarding himself, not concern regarding the victims. (T. V 731). The prosecutor opined that if Walls was a caring person why didn't he say to himself that this has gotten out of hand and once he realized the first victim was hurt and that Walls should have called an ambulance. (T. V. 733). Defense counsel responded by arguing that Walls gave the statement freely not because of the evidence against him. (T. V. 735).

[7] *Ferguson v. State*, 593 So.2d 508 (Fla. 1992)

Evidentiary hearing

At the evidentiary hearing, Lead counsel, Chief APD Loveless testified that (PCR IV 611). He testified that and the prosecutor argued whether Walls was a cold blooded killer or remorseful. (PCR IV 653). Co-counsel, Assistant Public Defense, James Sewell, testified that lack of remorse was not an aggravator but that remorse was a mitigator. (PCR IV 691). Remorse was a big part of their case. (PCR IV 704).

Merits

Lack of remorse is not an aggravating factor. *Valle v. State,* 581 So.2d 40, 46 (Fla. 1991)(noting that lack of remorse is not a statutory aggravating factor citing Robinson v. State, 520 So.2d 1 (Fla.1988)). However, remorse is a non-statutory mitigating circumstance. *Beasley v. State*, 774 So.2d 649, 672 (Fla. 2000)(explaining that mere sorrow, rather than true remorse, is not a mitigating factor citing *Robinson v. State*, 520 So.2d 1, 6 (Fla.1988) and *Pope v. State*, 441 So.2d 1073, 1078 (Fla.1983)). A prosecutor is entitled to rebut defense counsel's arguments. *Walton v. State*, 547 So. 2d 622, 625 (Fla. 1989)(explaining that, while lack of remorse may not be introduced by the State because it amounts to non-statutory aggravator, lack of remorse may be presented by the State to rebut mitigating evidence of remorse and finding no error where defense counsel opened the door to the remorse evidence).

This exchange was fair response. The prosecutor was simply rebutting defense counsel's assertion that his client regretted

the murders and admitted his guilt. Defense counsel's performance was not deficient for failing to make an baseless objection. Defense counsel merely recognized fair rebuttal argument when he heard it. *Sorey v. State*, 463 So.2d 1225 (Fla. 3d DCA 1985)(rejecting an ineffectiveness claim for failing to object to the prosecutor's closing argument because the prosecutor's statement constituted a fair response to defense counsel's comments).

Furthermore, there is no prejudice. Even if defense counsel had objected and preserved the claim and the prosecutor's statements are not viewed as fair reply, the error would have been found to be harmless. *Shellito v. State*, 701 So.2d 837, 842 (Fla.1997)(determining that prosecutor's "brief" reference to the defendant's lack of remorse was of minor consequence and constituted harmless error"); *Kokal v. Dugger*, 718 So.2d 138, 143 (Fla. 1998)(rejecting an ineffective assistance of appellate counsel for failing to raise prosecutor's reference to lack of remorse because it was a one-word reference in a lengthy and otherwise proper closing argument); *Valle v. State,* 581 So.2d 40, 46 (Fla. 1991)(prosecutor's lack of remorse argument was harmless error due to the minimal amount of mitigating evidence).

***NIXON* ISSUE**

Walls asserts trial counsel violated *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000) and *Harvey v. State*, 28 Fla.L.Weekly S513 (Fla. July 3, 2003), by conceding guilt to the facts of felony murder. IB at 35. The State respectfully disagrees. *Nixon* does not apply where counsel conceded to the facts of felony murder but disputed premeditated murder. Counsel subjected the State's case to meaningful adversarial testing by contesting premeditated murder. *Strickland*, not *Cronic*, governs a partial concession.[8] There is no prejudice. The jury found premeditated murder. The jury would have convicted Walls of first degree murder regardless of counsel's concession to felony murder. Moreover, even if *Nixon* applies to partial concessions, the requirement of an affirmative, explicit acceptance was met in this case. Both trial counsel testified at the evidentiary hearing that they obtained Walls' consent to conceding to the facts of felony murder. This was a retrial. Counsel had made the same concession in the first trial and conceding was rediscussed with Walls prior to the second trial. Walls consented to this strategy as required by *Nixon*. Thus, the trial court properly denied this claim of ineffectiveness.

The trial court's ruling

The trial court ruled:

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[8] *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *United States v. Cronic*, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984).

> Claim II alleges ineffective assistance of counsel for concession of guilt and the concession of aggravating circumstances. The defendant alleges that trial counsel conceded the defendant's guilt and eligibility for the death penalty and that he did not consent to the concessions. Both Mr. Loveless and Mr. Sewell testified that they met with the defendant and discussed strategy on dozens of occasions beginning in 1987. They both testified that from the beginning their trial strategy was to save his life and that there was no question that he was going to be convicted of felony murder. The defense strategy was to admit the burglary, but try to show that the murders were not part of a premeditated plan. They considered the guilt phase as part of the penalty phase process. Trial counsel testified that they had no choice but to concede to felony murder, which made it necessary for them to concede the aggravating circumstance of murder during the commission of a burglary. Mr. Loveless testified that there was no question in his mind that the defendant understood and agreed with the trial strategy. Mr. Sewell testified that he met with the defendant at least once a week during preparations for the retrial and the strategy of admitting the burglary was discussed and agreed to by the defendant. The Court is satisfied that defense counsel discussed the strategy with the defendant and the defendant agreed to this strategy.
>
> Although the defendant testified at the evidentiary hearing that he never agreed to the trial strategy, the Court does not find this testimony by the defendant to be credible. The defendant testified that there had not been a change in strategy from the first trial to the retrial. Further, the defendant testified at the evidentiary hearing that he thought that his trial counsel would argue that he had no intent to commit the murders. This is exactly the trial strategy they utilized. The Court is also satisfied that the defendant fully understood the discussions with his attorneys and was competent to agree to the defense strategy. The defendant was competent to stand trial; thus, he was competent to agree to and consent to concede his guilt. Thus, the defendant fully consented to the defense strategy and his trial counsel did not render ineffective assistance of counsel by conceding felony murder and the burglary aggravator.

(PCR III 455-456).

Trial

Defense counsel during opening of guilt phase, stated that “we’ve got to tell it like it is.” (III 370). He then stated he was not going to deny most of the facts of the case. Counsel

stated that “Frank Walls broke into that trailer and two people died as a result.” Counsel stated in penalty phase closing that we have never said that Frank was not guilty of murder. (VI 998).

Walls also asserts that counsel's opening statement was a concession of the aggravators of (1) a prior capital crime; (2) the murder was committed during a burglary and (3) the murder was committed for pecuniary gain. Contrary to Walls' claim, counsel did not concede to the existence of these three aggravators in his opening argument in the guilt phase. Nor did counsel concede to these aggravators in his closing argument in the penalty phase; rather, he argued against most of the aggravators. (VI 1002-1004). Moreover, counsel argued against two of the aggravators in his sentencing memo. (VII 1136-1138). Counsel argued that the pecuniary gain aggravator should not be found due to improper doubling and was usually reserved for contract killings or those involving life insurance. (VII 1137). Counsel argued against the prior capital crime aggravator by noting that Walls had never been convicted previously of a violent felony. (VII 1136). Counsel did concede the murder was committed during a burglary aggravator. Counsel's theme was that this was a burglary gone bad. (T. VI 1004).

Evidentiary hearing

At the evidentiary hearing, lead counsel, Chief APD Loveless, testified that he represented Walls at both trials. (PCR IV

601). There was no change in strategy from the first trial which was in counsel's opinion "the only strategy available." (PCR IV 605). He admitted that by conceding that Walls committed a burglary and two people died as a result, the effect was conceding guilt to felony murder. (PCR IV 625). He did not contest felony murder. (PCR IV 626). He told Walls that there was no way to dispute the felony murder charge before both trials. (PCR IV 626). He discussed this Walls on "dozen of occasions." (PCR IV 626). He explained to his client how he was going to defend the case. (PCR IV 606). They had "numerous, numerous discussions" of the case, the evidence and "what our options were and were not" (PCR IV 608). Counsel testified that Walls would not have heard his exact opening or closing statement but he did tell him what he was going to try to get across to the jury. (PCR IV 608-609). Walls was not very responsive during the second trial. (PCR IV 609). Mr. Loveless had a competency concern about his client but Walls generally understood most of the time. (PCR IV 606, 610). Counsel saw no reasonable way that Walls would not be convicted of first degree murder. (PCR IV 636). Walls was fully advised on counsel's opinion and the tactic. (PCR IV 637). Counsel testified that Walls understood overall. (PCR IV 637). Counsel specifically testified that Walls "agreed with the procedure" of conceding. (PCR IV 637). Walls was advised of and agreed to this tactic. (PCR IV 638). New co-counsel for the second trial, Mr. Sewell, agreed with lead counsel assessment of the case. (PCR IV 640). The tactic was rediscussed with Walls prior to the second trial.

(PCR IV 640-641). Walls was “certainly” still agreeable to the tactic at the retrial. (PCR IV 640). Lead counsel testified that there were no substantial differences between his opening and closing argument of the first and the second trial. (PCR IV 640). There was no question whatsoever in lead counsel’s mind that Walls knew what strategy was going to be used in the second trial. (PCR IV 641). There was also no question that Walls agreed to the strategy. (PCR IV 641). Retaining credibility is sometimes the only thing you’ve got and with Walls’ confession and the fingerprint evidence, counsel felt he would lose credibility if he argued that Walls did not commit the burglary. (PCR IV 642). To save Walls’ life, counsel was attempting to portray the crime as a burglary gone bad. (PCR IV 642-643). You cannot separate the guilt phase from the penalty phase in a case like this. (PCR IV 644). Counsel did not admit that Walls was guilty of the premeditated murder of Peterson. (PCR IV 646). Counsel again testified that Walls understood and agreed to the concession. (PCR IV 669). Counsel testified that by conceding felony murder he was also necessarily conceding the felony murder aggravator. (PCR IV 627).

Co-counsel, Assistant Public Defense, James Sewell, also testified. (PCR IV 681). He was the Chief Assistant Public Defense in Okaloosa County at the time of the trial in 1992. (PCR IV 681). He first handled capital cases in 1985. (PCR IV 682). He had probably handled 5 to 7 capital cases previously.(PCR IV 682). He testified that he meet with the defendant once a week for over a year. (PCR IV 692-693). Mr.

Sewell testified that Walls was involved in making those decisions. (PCR IV 693). Walls agreed to the concession. (PCR IV 706).

Walls testified at the evidentiary hearing at he did not agree to the strategy to the "best of his knowledge". (PCR IV 714-715). When asked if there was any difference between the strategy in the first trial and the retrial, Walls stated "I believed in my attorneys" because "they knew what they were doing." (PCR IV 716). He told his attorneys that he did not commit the crime with intent he "went berserk", "crazy" and "things just happened" (PCR IV 720).

He admitted that the second trial was to a large extent the same as the second trial. (PCR IV 721).

Merits

In *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*), this Court held that counsel's concession of guilt to the charged crime amounts to an involuntary plea and is *per se* ineffective. Nixon claimed that his counsel was *per se* ineffective for conceding his guilt to first degree murder in closing of the guilt phase.[9] During closing, Nixon's trial counsel said:

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

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

Nixon, 758 So.2d at 620. Nixon was not present when his attorney made the concession. *Nixon*, 758 So. 2d at n.3. The *Nixon II* Court concluded that *Cronic*,[10] not *Strickland*,[11] applied because a concession to the charged crime fails to subject the prosecution's case to meaningful adversarial testing. *Nixon*, 758 So.2d at 621-623. The Court noted that under *Cronic*, prejudice is presumed. The *Nixon II* Court reasoned that counsel's concession to the charged crime operated as the "functional equivalent of a guilty plea." *Nixon*, 758 So.2d at 624. The Court explained that concessions are not *per se* ineffectiveness if the defendant consents to the concession. The *Nixon II* Court observed that the dispositive question was whether Nixon had given his consent to the trial strategy of conceding guilt. *Nixon*, 758 So.2d at 624. The *Nixon II* Court concluded that "Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy" and "[s]ilent acquiescence is not enough." *Nixon*, 758 So. 2d at

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

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

624. The trial court had originally denied the claim without an evidentiary hearing. This Court reversed the summary denial and ordered an evidentiary hearing be held. *Nixon*, 758 So. 2d at 625.[12] In *Nixon v. State*, 857 So.2d 172 (Fla. 2003) (*Nixon III)*, this court reversed the trial court's denial of post-conviction relief and remanded for a new trial. At the evidentiary hearing held to follow the mandate of *Nixon II*, Nixon's trial counsel testified that Nixon did nothing when asked his opinion regarding this trial strategy. Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt. Nixon did not testify at the evidentiary hearing. The trial court found, based on the history of interaction between Nixon and his trial counsel where counsel would inform Nixon of something and Nixon would remain silent, that Nixon had approved of counsel's strategy. However, the *Nixon III* Court disagreed with the trial court's conclusion, reasoning that the evidentiary hearing

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[12] The *Nixon II* Court relied on three federal circuit cases: *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991); *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) and *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981). Both *Swanson* and *Wiley* were non-capital cases. Unlike a non-capital case where there is no reason to concede to the charged crime, in a capital case conceding to the charged crime is a reasonable trial tactic. In the words of one court, it is "necessary for counsel to retreat from an unlikely acquittal of a patently guilty client, so that he might attain the more realistic goal of saving the client's life." *Young v. Catoe*, 205 F.3d 750, 760 (4th Cir. 2000). Counsel's focus in a capital case is on the sentence, not the conviction. Obtaining a life sentence is winning a capital case. Moreover, the Ninth Circuit has declined to apply this rule to non-capital cases. *Anderson v. Calderon*, 232 F.3d 1053, 1087 (9th Cir. 2000).

testimony, at most, demonstrated silent acquiescence by Nixon to his counsel's strategy. The *Nixon III* Court found there was no competent, substantial evidence establishing that Nixon affirmatively and explicitly agreed to counsel's strategy. *But see Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002)(en banc)(holding *Strickland*, not *Cronic*, governed attorney concessions of guilt, relying on *Bell v. Cone*, 535 U.S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843, 1850 (2002) and finding no ineffectiveness where counsel conceded to lesser included offense of second degree murder, in a capital case, even though the defendant specifically objected to the concession at trial and asserted his innocence).[13]

Here, unlike *Nixon*, counsel specifically testified that Walls "agreed with the procedure" of conceding. (PCR IV 637). Lead counsel testified that there was no question that Walls agreed to the strategy. (PCR IV 641). Nixon remained silent when hid counsel discussed the matter with him. Nixon was not even in the courtroom when counsel explicitly conceded his guilt to

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

first degree murder at trial. Here, Walls was present. Moreover, Walls was present at the first trial too. Basically, counsel's tactic of conceding to the facts of felony murder at the second trial was just a repeat performance of the same tactic of the first trial. Walls knew exactly what counsel's tactic was going to be. He had seen and heard the tactic at the first trial. He also knew that the tactic was successful in that it had obtained him a life recommendation for one of the murders and one vote from life recommendation for the second murder. The tactic was rediscussed with Walls prior to the second trial. (PCR IV 640). Lead counsel testified that there were no substantial differences between his opening and closing argument of the first and the second trial. (PCR IV 640). Counsel obtained Walls' explicit agreement to the concession as required by *Nixon III*.

In *Harvey v. State*, 28 Fla.L.Weekly S513 (Fla. July 3, 2003), this Court found that while counsel argued for second degree murder, his concession to the underlying facts amounted to a concession of premeditated murder. In opening, defense counsel admitted that Harvey was guilty of "murder" and acknowledged that Harvey and his coperpetrator discussed killing the victims. The *Harvey* Court found that by admitting this discussion about the murder, trial counsel, in effect, conceded premeditation and therefore, conceded first degree murder. The *Harvey* Court concluded that this concession was the functional equivalent of a guilty plea which requires the "affirmative, explicit" consent of the defendant. Relying on *Nixon II*, the *Harvey* Court

concluded defense counsel was ineffective. The evidentiary hearing testimony established, at best, that Harvey's counsel had obtained his consent to concede but only to second degree murder, not first degree. Furthermore, the *Harvey* Court also found that an admission that the murder occurred during the robbery was a concession to felony murder as well.[14]

Harvey is distinguishable. The problem in *Harvey* was that counsel needed to obtain consent to conceding the facts of first degree murder but only obtained consent to concede to second degree murder. Here, counsel obtained his client's consent to concede to the facts of felony murder, not just second degree murder. Defense counsel conceded to the facts of felony murder just as he had done in the first trial. The defendant knew the exact concessions that was going to be made because it was the same concession had been made in the first trial.

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[14] *Harvey* ignores the difference between the concepts of weight and sufficiency. When an attorney acknowledges the facts of the crime but argues for a conviction for a lesser crime, he is NOT conceding to the greater crime. Rather, he is acknowledging the sufficiency of evidence of the greater crime, not its weight. Counsel is telling the jury that, while they could vote for the greater crime, they should not vote for the greater crime based on the weight of the evidence. The fact that evidence is legally sufficient does not compel a particular result. He is arguing the weight of the evidence supports the lesser crime. This is not the functional equivalent of a guilty plea to the greater crime; rather, it is the functional equivalent of not making a motion for judgment of acquittal to the greater crime. Just as an attorney may decline to make a motion for judgment of acquittal, an attorney can admit the underlying facts but argue, given those facts, that the greater weight of the evidence supports a verdict for the lesser crime. This is not conceding to the greater crime. This Court should recede from *Harvey*.

While trial counsel conceded to felony murder by conceding the facts of felony murder, he argued against premeditated murder. Counsel did not admit that Walls was guilty of the premeditated murder of Peterson. (PCR IV 646). The jury found both premeditated murder and felony murder. (T. VII 1128). Conceding to one form of first degree murder is similar to conceding to a lesser degree crime or to one count of a multi-count indictment.[15] Just as conceding to second degree murder is not error, neither is conceding to felony murder when the state is arguing both theories. Conceding to second degree murder when the charge is first degree and the jury convicts of first degree murder is not the functional equivalent of a guilty plea. Or more precisely, the jury has rejected the "involuntary plea" of

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[15] *Atwater v. State*, 788 So.2d 223 (Fla. 2001)(finding that counsel's concession to second degree murder in a first degree murder trial does not require the defendant's consent because there was adversarial testing); *Brown v. State*, 755 So. 2d 616, 629-630 (Fla. 2000)(holding that concession of guilt of lesser offense did not require defendant's consent and finding no ineffectiveness using *Strickland* and citing *McNeal v. Wainwright*, 722 F.2d 674 (11th Cir. 1984)); *United States v. Holman*, 314 F.3d 837 840 (7th Cir. 2002)(observing that conceding guilt to one count of a multi-count indictment to bolster the case for innocence on the remaining counts is a valid trial strategy which, by itself, does not rise to the level of deficient performance); *United States v. Simone*, 931 F.2d 1186, 1195 (7th Cir. 1991)(explaining that when the admissions concern only some of the charges to be proven, counsel's concessions have been treated as tactical retreats and deemed to be effective assistance); *United States v. Gomes*, 177 F.3d 76 (1st Cir. 1999)(finding it a "patently a reasonable strategy" to concede to one count of five counts but not reaching the issue of whether the defendant's consent is necessary); *Richardson v. United States*, 698 A.2d 442 (D.C. App. 1997)(finding the tactic of conceding to some of the less serious charges in a multi-count case to be reasonable).

second degree murder. The jury's verdict of first degree murder in that situation is the result of adversarial testing at trial, not the guilty plea to second degree murder, whether voluntary or not.[16] It is not ineffectiveness *per se* because trial counsel has not completely conceded to the charged crime. It cannot be said that counsel "entirely failed to subject the State's case to meaningful adversarial testing" when counsel disputed premeditated murder. Counsel at least partially subjected the State's case to meaningful adversarial testing by disputing premeditated murder. Because it was only a partial concession, such a claim is outside the *Cronic* realm, in the *Strickland* realm.

There is no deficient performance. The sheer number of cases involving concessions in this court and courts through out the nation, show this is a rather standard practice among the defense bar and that reasonable counsel engage in this practice rather routinely. Standard practice cannot be deficient performance by definition.

Nor is there any prejudice. The jury found premeditated murder. The jury would have convicted Walls of first degree

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

murder regardless of counsel's concession to felony murder. So, there is no prejudice under *Strickland*.

CONCESSION TO AGGRAVATORS

Walls asserts that his counsel was ineffective *per se* for conceding to the felony murder aggravator. *Nixon* does not apply to concessions of aggravators. Conceding to an aggravator is not the same as agreeing that the death penalty is the appropriate sentence. If counsel admits an aggravator exists, he is not conceding death is the appropriate penalty. *Nixon* would only apply if trial counsel conceded that death was the appropriate sentence in the penalty phase. It is only when defense counsel admits that death is the appropriate penalty does he "entirely fails to subject" the State's penalty phase to "meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Bell v. Cone*, 535 U.S. 685 (2002)(applying *Strickland*, not *Cronic*, and rejecting ineffectiveness claim for failing to present any mitigating evidence in the penalty phase and waiving final closing argument, where defense counsel argued for life, based on mitigating evidence presented in the guilt phase, in the opening of the penalty phase because counsel did not entirely fail to subject the State's case to adversarial testing). Defense counsel may concede to all the aggravators the State is seeking and then presenting mitigation and argue that the mitigation outweighs the aggravators without violating *Nixon*. Such a penalty phase tactic does not entirely fail to subject the State's penalty phase case to adversarial testing. Such a tactic is akin to an affirmative defense. Here, trial counsel did not concede that death was the appropriate penalty. Trial counsel argued for life.

A defendant may only raise a typical *Strickland* ineffectiveness claim when trial counsel merely concedes to an aggravator rather than conceding to the death penalty. Under *Strickland*, Walls must show both deficient performance and prejudice. Counsel only conceded to one aggravator and did that in furtherance of his "burglary gone bad" theory. Such a related theme has often been successful at the appellate level. *Terry v. State*, 668 So.2d 954 (Fla. 1996) (holding death was disproportionate in a robbery gone bad case); *Sinclair v. State*, 657 So.2d 1138 (Fla.1995); *Thompson v. State*, 647 So.2d 824 (Fla.1994). There was significant mitigation including a prior history of mental illness. There was no significant history of prior criminal activity, the defendant's age and emotional problems.[17] Conceding to one aggravator where there is significant mitigation is not ineffectiveness. Thus, the trial court properly denied this claim following an evidentiary hearing.

[17] The trial court found nine mitigating circumstances: (1) Walls had no significant history of prior criminal activity; (2) Walls' age at the time of the crime (nineteen); (3) Walls had been classified as emotionally handicapped; (4) Walls had apparent brain dysfunction and brain damage; (5) Walls had a low IQ so that he functioned intellectually at about the age of twelve or thirteen; (6) Walls confessed and cooperated with law enforcement officers; (7) Walls had a loving relationship with his parents and a disabled sibling; (8) Walls was a good worker when employed; and (9) Walls had exhibited kindness toward weak, crippled, or helpless persons and animals.

PROSECUTORIAL COMMENTS

Walls asserts that counsel was ineffective for failing to object to the prosecutor's comments. Counsel was not ineffective because

the prosecutor's comments were proper. Thus, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

The trial court's ruling

The trial court ruled:

> Claim III alleges numerous claims of ineffective assistance of counsel for failing to object to prosecutorial comment and argument. The defendant alleges that trial counsel did not object to the prosecutor arguing that the defendant would be a future danger of society. Trial counsel testified that he did not believe this statement to be a "future danger" statement, but rather a comment on Dr. Valentine's penalty phase testimony. The transcript clearly demonstrates that the defendant is entitled to no relief on this allegation.[18] The transcript reveals that the prosecutor argued his recollection of Dr. Valentine's testimony, and as such trial counsel did not render ineffective assistance of counsel for failure to object to this comment.
>
> The defendant also alleges that trial counsel was ineffective for not objecting to the prosecutor's argument that the defense had not put on proper mitigating evidence because they did not prove that the defendant went to church. Mr. Loveless testified that he did not find this statement objectionable because he did not believe that this was a comment on church attendance. In fact, the record clearly demonstrates that this was a comment on the presentation of mitigators and as such is not objectionable.[19] The record clearly demonstrates that counsel was not ineffective for failing to object to this statement.

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[18] Record on Appeal, Vol. VI, P. 988-989, attached hereto as Exhibit "I"

[19] Record on Appeal, Vol. VI, P. 991, attached hereto as Exhibit "J"

> In addition, the defendant alleges that trial counsel was ineffective for failure to object to the prosecutor's argument that because this was a double murder the jury would 'have to' find that the prior violent felony aggravator should be applied. However, the record clearly shows that Mr. Loveless did in fact object to this statement of the law.[20]
>
> The defendant also alleges that trial counsel was ineffective for failing to object to the prosecutor's characterization of the defendant's bipolar disorder as a "mood swing." Mr. Loveless testified that he did not find this characterization objectionable. In fact, Dr. Valentine testified to the defendant's bipolar disorder as causing mood swings[21] and the record clearly demonstrates that the prosecutor was recollecting Dr. Valentine's testimony.[22] The comments were not objectionable and trial counsel did not render ineffective assistance of counsel for failure to object.
>
> As to the allegations that trial counsel failed to object to the prosecutor's argument that the defendant should be executed because he lacked the will to be a good person and executed because of his mental illness, the record clearly indicates that the defendant is entitled to no relief on these claims.[23] The prosecutor's comments could in no way be construed as a statement that the defendant should be executed because of his mental illness or his lack of will to be a good person. The defendant has failed to established that his trial counsel's performance was deficient or prejudicial; therefore, the defendant is not entitled to relief pursuant to *Strickland v. Washington*.

(PCR III 456-458)(footnotes included but renumbered).

Evidentiary hearing

Lead counsel, Chief APD Loveless testified that he conducts a very low key defense and only objects to prosecutor's comments when it's a "very improper statement". (PCR IV 653). He

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[20] Record on Appeal, Vol. VL P. 992-993, attached hereto as Exhibit "K."

[21] Record on Appeal, Vol. V, P. 826-829, attached hereto as Exhibit "L."

[22] Record on Appeal, Vol. VI, P. 988-989, attached hereto as Exhibit "I"

[23] Record on Appeal, Vol. VI, P. 989, Exhibit "I"

testified that rather than objecting, sometimes it is better to use the statement in rebuttal. He did not take the prosecutor's comment on the tool of Lithium as a future dangerousness argument or he would have objected. (PCR IV 655). Trial counsel felt that the prosecutor's comment that because the jury had found the defendant guilty of the murder of Alger they would find the prior violent felony murder aggravator was not objectionable. (PCR IV 657). The trial transcript reflect asked the trial court to instruct the jury they free to consider or reject aggravators, which he did. (PCR IV 658).

Merits

During closing arguments of penalty phase, the prosecutor was discussing Dr. Valentine testimony. (T. VI 988-989). The prosecutor stated:

> ...the medication is not what it takes to overcome a problem you have with bipolar, that's mood swings. We all have mood swings. Some people have them a little bit more than others, and they give that a name and they call it bipolar, but it said the medication wouldn't necessarily solve any problem anyway it's just a tool. That's the word he used, I think. Again my recollections of the facts is one thing. You depend on your's My recollection is he said it was a tool and you've got to have the will and the desire to conform to society's ways and to be productive and to be a good person to have values and live by them, then the tool of lithium can help but you've got to have that first.

The prosecutor's main point was that Walls would not take the medicine and lithium would not do any good if the patient did not have the willingness to be productive, not to denigrate the bipolar condition. Walls seems to object to the prosecutor use of the term "mood swings." Counsel was not ineffective for

failing to object to the prosecutor's use of a colloquial term rather than the technical medical term. There is nothing objectionable about a prosecutor's use of a more commonplace phrase. Counsel is not ineffective for failing to make such baseless objections.

Walls next asserts that counsel was ineffective for failing to object to the prosecutor's comments regarding Walls' church attendance. The prosecutor stated:

> That's pretty much the mitigation. We didn't hear a lot of things, at least not - what kind of values Frank had, what was his idea of right and wrong, did he go to church, was he the kind of person to stand up for what's right and put aside what was wrong, who were his friends, where did he go at night. Nobody knows those things. At least if they did, they didn't come in here and testify about it.

(T. VI 991). The prosecutor was not using Walls failure to attend church as non-statutory aggravation. Rather, the prosecutor was rebutting the mitigation presented by the defense and pointing out that there were numerous holes in the picture presented of Walls' childhood and development. There is nothing objectionable about highlighting the gaps in mitigation and counsel is not ineffective for recognizing this.

The prosecutor then turned to the aggravating circumstances in this case. (T. VI 991). The prosecutor stated:

> Frank Walls committed this offense after he had committed the offense of the murder of Ed Alger and this is - there's no question about this, not in your mind. You've already rendered your verdict. You know that. This is a double murder. That means it is permissible for you to find that this is an aggravating factor in this case. You will, you have to, because you found that he killed Ed Alger first. He didn't kill Ann Peterson first. That's the first aggravating factor.

(T. VI 992). This is a correct statement of the law and counsel is not ineffective for failing to object when the prosecutor correctly states the law or argues that the facts support a particular aggravator. The trial court instructed the jury the were free to consider or reject the aggravator. Thus, counsel cannot be deemed ineffective for failing to make meritless objections.

ISSUE II

DID THE TRIAL COURT PROPERLY DENY AN EVIDENTIARY HEARING ON VARIOUS CLAIMS? (Restated)

Walls asserts the trial court improperly denied an evidentiary hearing on various claims. These claims were cumulative or are refuted by the record. Thus, the trial court properly denied an evidentiary hearing on these claims.

A. FAILURE TO PRESENT AN EXPERT ON RITALIN

Walls asserts that his counsel was ineffective in failure to present an expert on Ritalin. IB at 40. Walls' hyperactivity and use of Ritalin was presented to the jury. Walls claims that Dr. Chandler did not place "sufficient emphasis" on the use of Ritalin. The trial court correctly found this evidence to be cumulative.

At the evidentiary hearing, the trial court addressed the issue of allowing Dr. Breggin, the defense expert on Ritalin to testify. (PCR IV 594-598). The trial court found that he was qualified as an expert, but found that the expert in his report did not disagree in any way with Dr. Chandler's final diagnosis presented at trial and his testimony would, therefore, be cumulative to the experts' testimony at trial. (PCR IV 597). This claim is refuted by the record.

B. FAILING TO PRESENT LIFE HISTORY

Walls asserts that his trial counsel was ineffective for failing to investigate and present additional mitigating evidence. Walls asserts that counsel was ineffective for

failing to present his difficult birth, hyperactivity, childhood illnesses and migraines to the jury and judge. Much of this mitigating evidence was in fact presented. Walls claims that counsel should have presented the mitigation evidence regarding his bipolar disorder. Dr. Valentine, a psychiatrist who treated Walls in Gulf Coast Hospital in 1985, testified in penalty phase regarding his diagnosis of bipolar. (T. V. 824, 826-827). Dr. Valentine had prescribed lithium carbonate. (T. V. 828). Dr. Hagerott testified that Walls was a blue baby who suffered from decreased oxygen at birth and discussed Walls' childhood fevers. (T. V. 848). Dr. Hagerott testified regarding Walls' hyperactivity starting in childhood. (T. V. 848). Counsel cannot be ineffective for failing to do something that he, in fact, did. Because the record conclusively rebuts this claim, the trial court properly denied an evidentiary hearing.

C. FAILING TO PRESENT EXPERT DRUG TESTIMONY

Walls also asserts that his counsel was ineffective in failure to present a pharmacologist to testify as to the effects of illegal drugs and alcohol. IB at 42. Walls, in his taped confession, stated that he was not intoxicated at the time of the crime. He stated that he had had "only three or four beers." (IV 681). Walls told Dr. Chandler that he had only tried marijuana once and did not drink much alcohol. (V. 866). Moreover, Walls' history of drug use was presented. Dr. Hagerott testified regarding Walls "very strong history of drug use including speed, cocaine, heroin, hash, marijuana and

alcohol" and that his use of alcohol was "quite severe" (T. V. 849).

There is no deficient performance. Counsel presented Walls history of drug use. Counsel is not ineffective for failing to present an intoxication defense or mitigating evidence that his client's own confession and statements to his doctors would rebut. *Cherry v. State*, 781 So.2d 1040, 1050 (Fla. 2000)(holding that trial counsel was not ineffective, at penalty phase of capital murder trial, by not presenting evidence of nonstatutory mitigator that defendant was intoxicated at the time of the incident because while defendant admitted to drinking several beers, defendant's testimony at trial did not indicate that he was intoxicated). Walls' own confession prevented that.Because the record conclusively rebut this claim of ineffectiveness, the trial court properly denied a evidentiary hearing on this claim.

D. FAILING TO OBTAIN A PET SCAN

Walls also asserts that counsel was ineffective in failing to obtain a Positron Emission Tomography (PET) scan to confirm that expert's testimony that was presented regarding organic brain damage. IB at 43.

At the evidentiary hearing, the trial court addressed the defense motion for a PET scan. (PCR II 316-318; PCR IV 599). The State relied upon its prior written objection which cited *Bottoson v. State*, 813 So.2d 31, 34 (Fla. 2002)(concluding that the trial court did not abuse its discretion when it denied

Bottoson leave to obtain a SPECT/PET scan because the claim was only speculative and Bottoson has not presented sufficient particularized need for the test citing *Robinson v. State*, 761 So.2d 269, 275-76 (Fla.1999)) and *Rogers v. State*, 783 So.2d 980, 998-99 (Fla. 2001)(holding that when considering whether the trial court abused its discretion, this Court should consider: (1) if the defendant established a particularized need for the test; and (2) if the defendant was prejudiced by the trial court's denial of the motion requesting a PET-scan). (PCR II 325). The trial court deferred ruling until after the evidentiary hearing. Lead trial counsel, Mr. Loveless testified, at the evidentiary hearing, that he was aware of PET scans had discussed the possibility of conducting a PET scan with his mental health experts. (PCR IV 629-631). Both his experts, Dr. Larson and Dr. Hagerott, informed him that a PET scan was not necessary.(PCR IV 630). Co-counsel, Assistant Public Defense, James Sewell, also testified that they discussed doing a PET scan with Dr. Hagerott and she thought her test were sufficient. (PCR IV 698). A the close of the evidentiary hearing, the trial court denied the request for a PET scan. (PCR IV 723-724).

There was no deficient performance. Trial counsel discussed the matter with his experts who told him that the test was not necessary to establish brain damage and would not show anything more than their neuropsychological testing did. This trial was held in 1992, prior to the widespread use of PET scans. *Brown v. State*,755 So.2d 616, 633, n. 13 (Fla. 2000) (explaining that PET scan was not widely accepted until recently and still is not

approved by the Food and Drug Administration as a medical diagnostic tool). Counsel is not ineffective for failing to present cutting edge science.

Moreover, counsel's performance was not deficient nor was Walls prejudice because Walls has not established that he has a particularized need for a PET scan. *Rogers v. State* 783 So.2d 980 (Fla 2001)(holding that defendant was not entitled to PET scan on direct appeal unless he established a particularized need for the test not merely that an expert thinks that a scan might be helpful). Furthermore, Dr. Valentine, a psychiatrist, who treated Walls in Gulf Coast Hospital in 1985, performed a CAT scan on Walls. (T. V. 826). Nor is there any prejudice. The trial court found that Walls had an apparent brain dysfunction and brain damage as a mitigator. The trial court did not abuse its discretion in denying the PET scan.

E. FAILING TO MOVE FOR A LIFE SENTENCE

Walls next asserts that the Florida Supreme Court holding in *Walls v. State*, 580 So.2d 131 (Fla. 1991) prevented him from presenting the testimony of three mental health experts who would have testified regarding statutory mental mitigation. IB at 44. Walls claims that these experts were unique because they examined him around the time of the crime and the prosecutor crossed-examined the experts actually presented by pointing out that they did not examine the defendant at the time of the crime.

In *Walls v. State*, 580 So.2d 131 (Fla. 1991), the Florida Supreme Court held that the State's improper use of subterfuge to obtain psychiatric information from defendant while he was incarcerated prior to trial precluded use of such information at trial. Correctional officer Vickie Beck was asked to conduct a surveillance of Walls. She befriended Walls and she told Walls that anything he told her would remain confidential. Beck took detailed notes of Walls' statements and behavior. The notes were given to the state and its examining psychiatrists. At the competency hearing, five experts testified, three experts found Walls incompetent and two experts found that he was competent. The latter two experts relied on Beck's notes. The Florida Supreme Court held that due process was violated when the State used this information at the competency hearing. The *Walls* Court directed that any further mental evaluations shall not rely to any degree, directly or indirectly, on the information obtained by Beck and that any such evaluations shall not be conducted by the experts who previously received the information taken as a result of the police subterfuge.

Walls' waived this claim by asserting as error the admission of the experts testimony based on Beck's notes. Walls sought a new trial with new experts and therefore, he may not now complain that at his new trial, his old experts were precluded from testifying. This Court granted Walls the relief that he sought.

Additionally, there is no prejudice to Walls. The prosecutor's cross-examination of Dr. Chandler, in which the

prosecutor pointed out that he treated Walls' years prior to the crime rather than contemporaneously with the crime, did not depend on the holding in ***Walls I***. The prosecutor could have and would have crossed on this matter regardless of the appellate court's decision. Furthermore, defense counsel can easily rebut this observation by the prosecutor by pointing out Dr. Chandler's diagnosis was made prior to the crime. This was a pre-existing mental condition, not one manufactured for trial. Such testimony is more, not less, believable.

Counsel asserts that trial counsel was ineffective for not moving for the imposition of a life sentence based on prosecutorial misconduct. First, there was no prosecutorial misconduct. The alleged error here is the exclusion of certain experts in the new trial. The prosecutor did not exclude these witnesses, the trial court did. Moreover, double jeopardy claims may not be premised on prosecutorial misconduct. The remedy for prosecutorial misconduct is a new trial, not the imposition of a life sentence. Such a motion would simply be denied. Double jeopardy does not work that way. A defendant must receive a life sentence from a fact finder to invoke the protections of double jeopardy. *Sattazahn v. Pennsylania*, 537 U.S. 101 (2003)(concluding that there was no double jeopardy bar to a new penalty phase after the first jury hung on the penalty and, pursuant to a state statute, the judge imposed a life sentence because there were no factual findings in favor of "acquittal of the death penalty" by either the jury or judge). No fact-finder ever found in Walls' favor on the issue of life

versus death in the death of Ms. Petersen. He was never acquitted of the death penalty and therefore, cannot invoke double jeopardy principles. Trial counsel is not effective for failing to file such a frivolous motion that completely fails to acknowledge proper double jeopardy principles and precedent.

MENTAL RETARDATION

Walls asserts that he is mentally retarded. IB at 47-49. Walls is not mentally retarded. The trial testimony established his IQ as between 101 and 102 which is normal. Thus, the trial court properly denied an evidentiary hearing on a claim rebutted by the trial record.

The trial court's ruling

The trial court denied an evidentiary hearing on this claim finding:

> The Court finds that Florida Statutes § 921.137 (2002) does not apply retroactively.

(PCR Vol. II 313).

Evidentiary hearing

At the evidentiary hearing, collateral counsel filed *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), as supplemental authority and urged the trial court to reconsider its prior ruling denying an evidentiary hearing on mental retardation. (PCR IV 600-601). The State pointed out that the trial record established that Walls was not retarded. (PCR IV 601). The prosecutor noted that the IQ test scores in 1980 were verbal of 94 and performance of 112 and in 1984 a 101 verbal and a 102 performance and that the lower IQ scores of 72 verbal and 75 non-verbal was after he was 18 years old and were also above the cutoff. (PCR IV 601-602). The trial court denied the requested relying in its prior ruling and also ruled that the issue of mental retardation was "tried sufficiently and

adequately before this jury" and the Court and even if the statute is retroactive, the mental retardation claim was "clearly refuted on the record." (PCR IV 602).

Merits

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the United States Supreme Court held that the Eighth Amendment prohibited the execution of mentally retarded persons. The *Atkins* Court reasoned that the mentally retarded, while not exempt from criminal sanctions, have diminished personal culpability. The *Atkins* Court overruled its prior holding in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The United States Supreme Court in *Atkins* left the definition of mentally retarded to the States. *Atkins,* 536 U.S. at -, 122 S.Ct. at 2250 (stating "[a]s was our approach in *Ford v. Wainwright*, with regard to insanity, we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.").

The definition of mentally retarded under Florida law has not yet been established. The Florida statute prohibiting the execution of the mentally retarded contains a definition, however, the Florida Supreme Court has yet to adopt this definition. § 921.137, Fla. Stat. (2002)(prohibiting imposition of the death sentence upon a mentally retarded defendant and establishing procedures for determining mental retardation). The issue of the retroactivity of *Atkins* and the definition of

mental retardation is currently pending in Florida Supreme Court in three cases. See *State v. Thomas*, SC00-1092; *State v. Burns*, SC01-166; and *State v. Miller*, SC01-837.

Even if *Atkins* is held to be retroactive and the Court adopts the statutory definition, Walls does not met the statutory requirements. The statute requires a showing of (1) that the defendant's IQ is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services; (2) a lack of adaptive behavior and (3) onset prior to eighteenth birthday. Walls must meet all three prongs. Walls assert that he is mentally retarded based on Dr. Hagerott's testimony and therefore, the Eighth Amendment prohibits his execution. However, Dr. Hagerott testimony regarding Walls' IQ was rebutted. Dr. Chandler, who had given Walls a series of mental health tests in 1984, approximately three years prior to these crimes, when he was approximately 17 years old, testified that Walls had an average IQ. (T. V. 787-822). Dr. Chandler relied on previously performed IQ tests. (T. V. 793). Dr. Chandler reported that Walls' IQ was 101 and 102 on the Weschsler Intelligence scale (V. 795). Dr. Chandler testified that Walls' IQ is "right in the middle of the average range". (T. V. 795).

Dr. Hagerott, who relied on the test that Dr. Larson performed after the crime, testified that, using the Weshsler Adult Intelligence scale revised, Walls had a verbal score of 72 and a nonverbal of 75 (T. 850-851). She testified that Walls was borderline retarded. On cross-examination, she admitted that

only person with scores below 70 are actually retarded and Walls' score was above 70. (T. V 867-868).

Regardless of his adaptive behavior, Walls cannot meet the first or third prongs. Walls' IQ at it lowest is still above the 70 cutoff and prior to his eighteenth birthday, his scores were in the normal range. Thus, this claim refuted by the record and the trial court properly denied an evidentiary hearing. *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002)(rejecting an *Atkins* claim where the evidence did not support the claim).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Harry P. Brody, Brody & Hazen, 1804 Miccosukee Commons Drive, P.O. Box 12999 Tallahassee, FL 32317 this 9th day of February, 2004.

_____
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CERTIFICATE OF FONT AND TYPE SIZE

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

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