IN THE SUPREME COURT OF FLORIDA

BOBBY RALEIGH,

Appellant,

v. **CASE NO. SC03-710**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

MISCELLANEOUS

STATEMENT OF THE CASE

This appeal is from the March 24, 2003, final order entered by Seventh Circuit Judge S. James Foxman, which denied Raleigh's *Florida Rule of Criminal Procedure* 3.851 motion following an evidentiary hearing. (EH1-440). On August 9, 2001, the Circuit Court had entered an order which denied relief on the claims on which no evidentiary hearing was necessary. (R496-513).

The facts of the underlying crimes.

Raleigh is under two death sentences for the June 5, 1994, murders of Douglas Cox and Timothy Eberlin. In its direct appeal decision affirming the death sentences (which were imposed after Raleigh entered a plea of guilty to both murders), this Court summarized the facts in the following way:

> In the early morning hours of June 5, 1994, while at the Club Europe in DeLand, Domingo Figueroa told Raleigh that someone had slapped his mother. Raleigh and Figueroa confronted Douglas Cox and his brother and while they were talking in the parking lot, Raleigh's mother ran out of the bar screaming at Cox. Raleigh took his mother to the car and returned to confront Cox. After apologizing for his mother's actions and shaking hands with Cox, Raleigh obtained guns from his home. Raleigh and Figueroa then drove to Cox's trailer.
>
> Raleigh went to the door with a gun in his hand and was told by Ronald Baker that Cox was asleep. Raleigh and Figueroa left, drove down a nearby dirt road, parked, and later returned to Cox's trailer carrying guns. Raleigh walked to the end of the trailer and shot Cox in the head three times at close range. Figueroa and Raleigh shot Tim Eberlin, Cox's roommate, until their guns jammed. Raleigh then beat Eberlin in the head with the barrel of the gun until he stopped screaming. Raleigh and Figueroa drove to Raleigh's

home where they burned the clothes they wore during the murders, dumped the bullets into a neighbor's yard, and later hid the guns in a secret compartment in Raleigh's Subaru. The police went to Raleigh's house that night and he agreed to talk to them. Raleigh initially denied his involvement in the murders, but after being told that Figueroa had implicated him, he taped a second statement admitting that he killed Cox and Eberlin.

On June 6, 1995, Raleigh pled guilty to two counts of firstdegree murder and the penalty phase was conducted from August 8 to August 15, 1995. A jury unanimously recommended the death penalty on each count. On February 16, 1996, the trial court sentenced Raleigh to death, finding that the aggravating circumstances, [FN1] outweighed the one statutory mitigating circumstance, [FN2] and several nonstatutory mitigating circumstances. [FN3].

> FN1. Aggravating circumstances: (1) defendant was convicted of a prior violent felony (Cox and Eberlin); (2) defendant committed the murder while engaged in a burglary (Cox and Eberlin); (3) defendant committed the murder in a cold, calculated, and premeditated manner (Cox); (4) defendant committed the murder to avoid arrest or effect escape (Eberlin); (5) the murder was especially heinous, atrocious, or cruel (Eberlin).
>
> FN2. Statutory mitigating circumstance: Raleigh was nineteen at the time of the crime (§§ 921.141(6)(g), Fla. Stat. (1995)).
>
> FN3. Nonstatutory mitigating factors: defendant (1) was intoxicated; (2) is remorseful; (3) pled guilty; (4) offered to testify against codefendant Figueroa; (5) could probably adjust well to prison life; (6) is a good son and friend to his mother; (7) is a good brother; (8) is a good father figure to ex-girlfriend's daughter; (9) was born into dysfunctional family; (10) did not know who fathered him; (11) attempted suicide; (12) has low self-esteem; (13)

> suffers from an adjustment disorder and is anti-social; (14) uses poor judgment and engaged in impulsive behavior; (15) is a follower.

Raleigh v. State, 705 So. 2d 1324, 1326-27 (Fla. 1997).

The direct appeal issues.

On appeal to this Court, Raleigh raised the following issues, as framed by this Court:

> Whether the trial court erred by (1) failing to instruct the jury on the "no significant history of criminal activity" statutory mitigator; (2) instructing the jury on the "pecuniary gain" aggravator; (3) failing to give the requested instruction on the "cold, calculated, and premeditated" (CCP) aggravator; (4) dismissing a juror over defense objection, where there was no showing that the juror could not be fair; (5) finding the "during the course of a burglary" aggravator; (6) finding the "avoid arrest" aggravator; (7) finding the CCP aggravator for Cox's murder; (8) finding the "heinous, atrocious, or cruel" (HAC) aggravator for Eberlin's murder; (9) rejecting the "under substantial domination of another" statutory mitigator; (10) rejecting the "no significant history of criminal activity" statutory mitigator; (11) giving only "some weight" to the "remorseful and cooperative with authorities" nonstatutory mitigator; (12) rejecting Figueroa's life sentences as a nonstatutory mitigator; (13) giving "little weight" to Raleigh's voluntary intoxication; and (14) sentencing Raleigh to death, because death is disproportionate.

Raleigh v. State, 705 So. 2d at 1327 n.4.

The postconviction proceedings.

The collateral proceeding trial court summarized the history of the postconviction proceedings in the following way:

> On November 20, 1998, attorney of record Christopher DeBrock, of Capital Collateral Region Counsel-Middle, filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request to Amend. On January 12, 1999, the Court ordered the State to respond to the motion. In their response, filed March 26, 1999, the State argued that the motion was legally insufficient. On January 19, 2001, new counsel, Kenneth Malnik, filed an Amended Motion to Vacate Plea, Judgment of Conviction and Sentence. On February 26, 2001, the State filed its Response to Defendant's amended motion, and on April 4, 2001, Defendant filed his Reply to the State's Response. On August 2, 2001, a *Huff* [footnote omitted] hearing was held. At the conclusion of the *Huff* hearing, and based on arguments presented therein, the Court granted Defendant an evidentiary hearing on claims (1), (3), (4), (6), (9), and (11). Subsequently, on August 9, 2001, the Court entered an Order denying Defendant any relief on claims (5), (7), (8), (10), (12), (13), and (14), but added claim (2) to the list of claims to be heard at the evidentiary hearing. The evidentiary hearing was held February 24-26, 2003, at which time the Court heard testimony from Dr. Ernest Bordini, Ms. Lisa Wiley, Attorney Michael Teal, Attorney Elizabeth Blackburn, Attorney James Alexander, and Attorney James Clayton. [footnotes omitted]. Defendant did not testify.

(R583-584).

The writ of prohibition.

After the August 2, 2001, *Huff* hearing, an evidentiary hearing was scheduled for December 11, 2001. However, on December 5, 2001, Raleigh filed a motion to disqualify the Office of the Seventh Circuit State Attorney. A hearing was held on this motion on December 11, 2001, and, on December 13, 2001, the Circuit Court entered an order denying the defendant's

motion. On or about January 14, 2002, Raleigh filed a "Petition for Writ of Certiorari" in this Court in which he sought review of the denial of his motion to disqualify the State Attorney's Office. *Raleigh v. State*, SC02-138. This Court treated the petition as a Petition for Writ of Prohibition, and, on March 15, 2002, issued an order denying the petition.

STATEMENT OF THE FACTS

Raleigh's *initial Brief* does not contain a statement of the facts addressing the evidence presented at the February 2003 evidentiary hearing. The State relies on the following statement of the facts:

At the evidentiary hearing held on February 24, 2003, Dr. Ernest Bordini, Ph.D., a licensed psychologist, testified that (EH9) his practice consists of clinical, forensic, and neuropsychological assessments with a specialty in "neuropsychology, psychological testing, forensics, alcohol/drug abuse." (EH10). He prepared a "preliminary evaluation" on Raleigh in January 2001, and prepared an additional report with what he called "cumulative findings" in November 2001, consisting of 11 pages and 54 pages, respectively. (EH17). Raleigh told Dr. Bordini that he did not know who his father was and that his mother was fifteen years old when he was born. (EH20-21). Dr Bordini testified that Raleigh was "effectively []

raised by various family members ... he had a very chaotic, unstable early childhood ... he often was a witness to physical abuse in the home ... he was sexually abused himself." Raleigh said that he reported this information to his previous attorney. (EH21-2). Due to his chaotic upbringing, Raleigh always wanted to please his mother, and saw himself as her "protector." His mother had told him of her own abuse, and, at one point, Raleigh remembered "sleeping with her in order to avoid (his mother)... being abused by another uncle that was in the home, or some other person in the home." (EH23). When he was older, Raleigh's mother remarried and had another child, which caused Raleigh to feel "very rejected by his stepfather." In addition, his mother developed cancer. (EH23). His stepfather made it very clear that Raleigh was not his son. Due to marital difficulties between his mother and stepfather, he felt that his stepfather, Jose, was "taking a lot of anger out on him." (EH24). Raleigh's mother told him about her sexual liaisons. He was well aware of her affairs and, according to Dr. Bordini, "took the role of deciding who could and couldn't dance with her when they were at a club." (EH25).

Raleigh told Dr. Bordini that it had been difficult for him to learn how to read. In addition, he had not been accepted by some of his peers because his stepfather was Hispanic. (EH27).

He started "huffing Freon on a pretty frequent basis" in middle school at the age of thirteen or fourteen. His grades deteriorated and he became increasingly truant. (EH28-9). Raleigh continued inhaling Freon and often passed out. His behavior became erratic. At one point, Raleigh used LSD and started drinking alcohol as well. (EH29). Prior to his arrest in this case, Raleigh was drinking 18 to 20 drinks in an evening, and would sometimes pass out. (EH30). In addition to substance abuse, Raleigh also exhibited "self-harm behavior." He told Dr. Bordini that, during his adolescence years, he would cut his arms and wrists in order to make them bleed. Dr. Bordini attributed Raleigh's behavior as a means of "tension release" and associated it with "borderline personality disorder." (EH31). At one point in time, Raleigh was hospitalized after he "tried to do himself in" by ingesting a large number of stimulants, spraying pesticide on ice cream, and eating it. (EH32).

Raleigh felt rejected by most of his family members, but was close with his cousin, Domingo Figueroa (co-defendant). Raleigh eventually got involved in drug dealing with "Garrett," someone he was attracted to in a sexual way, as well as his cousin, Domingo. (EH34-5). During the week prior to the murders, Raleigh recalled feeling increasingly out of control, and

decribed calling his mother, "pleading to her for her help." Dr. Bordini stated, "he was in a great deal of distress." (EH37). Although living in Virginia at that time, Raleigh returned to Florida.

On the day of the murders, Raleigh, his mother, and his cousin, Domingo, discussed going to a club later that evening. Raleigh started drinking prior to going, subsequently arriving at the club with Domingo, and his wife, Elaine. Raleigh's mother and girlfriend Andy, were meeting them there. (EH38-9, 40). According to Dr. Bordini, Raleigh started drinking pretty heavily right away and kept up a pretty steady pace throughout the evening. (EH40-1). Raleigh's mother and another patron at the bar, Douglas Cox (one of the victims), eventually got into an altercation. Dr. Bordini explained, "Bobby had the impression that Douglas had pushed his mother in some kind of way ... he knew his mother was involved in some way and came to her defense, in his mind." (EH42-3). Although Raleigh believed that the conflict was resolved, his cousin, Domingo, was angry at Douglas, and wanted to teach him a lesson as there was animosity between Douglas and some Hispanics in the community. (EH43). Raleigh and Domingo left the club, and retrieved some guns from Domingo's safe, which was located in Raleigh's house. (EH44). According to Raleigh and his mother, he did not have a key to

that safe.

Subsequently, Raleigh and Domingo drove to Douglas Cox's home. (EH45). Raleigh recalled entering Cox's home first, and spoke to an individual named Tim (the other victim), who was on the couch. Raleigh told Dr. Bordini that it was his and Domingo's intent to get Douglas Cox outside in order to "scare him and beat him up." (EH49-50). After Tim told Raleigh he could not go in Cox's room, Domingo entered the trailer, with a towel wrapped around his hand and a gun in his hand. According to Dr. Bordini, Raleigh saw Domingo make a motion or a nod, which he interpreted as direction to kill Douglas Cox. Raleigh told Dr. Bordini that he went into Cox's room and shot him in the head because he thought that was what Domingo wanted. (EH50). After exiting Cox's room, Raleigh shot Timothy until he either ran out of ammunition or the gun jammed, and then beat Timothy with the gun. Raleigh recalled running from the trailer. (EH50-1). Upon returning to his home, Raleigh and Domingo got rid of bullets and their clothing, and Raleigh went to sleep. (EH52). Although he was initially confused the next morning about the previous night's events, Raleigh realized he had killed Douglas Cox. (EH53).

Dr. Bordini spoke with Janice Figueroa, Raleigh's mother, regarding her prenatal care. She indicated she drank alcohol

during her pregnancy with Raleigh in a "significant amount." (EH54). She told Dr. Bordini that she had been sexually abused and had also been physically abused by Bobby's father. She indicated that mental and emotional problems were significant within her own family.(EH55). In addition, her relationship with Raleigh's step-father was "stormy" - - conflicts arose and there was a time when they discussed separating. (EH58).

Dr. Bordini felt Dr. Upson's clinical interview with Raleigh was deficient in some "critical areas." He believed Dr. Upson was not aware of "some critical areas in terms of witness statements about Bobby's state of mind and actions and behaviors ..." In addition, " ... he (Dr. Upson) didn't have enough information about domination to testify adequately with respect to that aspect of mitigating circumstances." Further, "there were some failures in terms of follow-up questioning in terms of history of depression, family psychiatric history ... failure to adequately understand Mr. Raleigh's behavior and psychiatric state in the days prior to the crime." (EH63). Dr. Bordini reviewed a number of records in addition to his evaluations of Raleigh. (EH64-7). Based on interviews with Raleigh and his mother, and statements made by other witnesses, Dr. Bordini estimated that Raleigh consumed 18 to 24 "standard doses of alcohol" during a six-hour time span the night of the murders.

(EH70). Raleigh had developed a high tolerance for alcohol as he had been consuming approximately 16 to 18 drinks per evening. However, he could not remember certain events that occurred the night of the murders due to his alcoholic state. (EH71, 73).

As a result of the tests conducted on Raleigh, it was Dr. Bordini's opinion that Raleigh "does have some cognitive disorder, not otherwise specified." His diagnosis was that Raleigh suffered from "amnesia due to substance abuse" and that he has "some communication deficits ... some language processing deficits." Further, Raleigh would "get confused as to what people are saying to him." (EH84, 85). Dr. Bordini said Raleigh was more likely to rely on visual information more than language and "showed a potential to get confused about things he recalls." (EH86, 88). Dr. Bordini diagnosed Raleigh as having a "cognitive disorder ... related to developmental factors and frequent Freon inhalation ... Substance abuse, persisting amnestic disorder ... communication disorder ... alcohol dependence and polysubstance abuse, which was in remission due to incarceration. Major depression ... post-traumatic stress disorder ... related to the murders ... and ... from childhood abuse ... anxiety disorder ... panic attacks ... and obsessive-compulsive behaviors. And finally, arithmetic disorder." In addition, he also believes Raleigh suffers from "borderline

personality disorder." (EH96-7). Dr. Bordini opined that Raleigh acted "much more like an early adolescent" at 19 years of age (his age at the time of these murders). (EH118). Finally, he believed that Raleigh was subservient to others, including Domingo Figueroa, his cousin and co-defendant in this case. (EH119).

On cross examination, Dr. Bordini reiterated that Raleigh does have antisocial features to his personality. However, he did not meet the entire diagnostic criteria under the DSM-IV-TR to support a diagnosis of Antisocial Personality Disorder.[1] (EH123).

He agreed that Raleigh was "pervasively impulsive" and showed a reckless disregard for himself as well as others. (EH126).[2] Although he believed that Raleigh was intoxicated at the time of the murders, he was still able to use a semi-automatic weapon in order to shoot one of his victims three times in the head. In addition, Raleigh's second victim was also shot and subsequently beaten to death with a pistol. (EH134, 138). Raleigh's mother, Janice Figueroa told Dr. Bordini that

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[1]American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Text Revision. Washington, DC, American Psychiatric Association, 2000.

[2]These are hallmarks of Antisocial Personality Disorder. DSM-IV-TR at 701-10.

she believed her son had been physically and sexually abused at "the age of four or five." (EH139). Raleigh had not reported this abuse to Dr. Upson and had he been asked, he "might have said, no." (EH140). Further, if Janice Figueroa did not report any facts of the case to Dr. Upson, Bordini said, " ... that would impair Dr. Upson's understanding of the facts that are potentially there ..." (EH142). Bordini reiterated that Raleigh used Freon as an inhalant for two to three months - - even though he eventually stopped, it was heavy use for two to three months. (EH145-46). Bordini testified that Raleigh is not mentally retarded, but rather is of average intelligence with a full scale IQ of 98 according to Dr. Upson's tests. Bordini did not conduct any intelligence testing on Raleigh. (EH147). Although he requested an interview with the co-defendant, Domingo Figueroa, his request was denied, and Bordini only spoke with Raleigh and his mother in connection with his work on this case. (EH148). Raleigh knew it was wrong when he killed his two victims. (EH161). Some of Raleigh's conduct "was purposeful and some conduct was pretty disorganized" on the night of the murders, including the disposal of evidence following the killings. (EH164, 166).

Lisa Wiley, a counselor with the Department of Corrections, provides mental health services to inmates on death row.

(EH174). She stated that Raleigh currently took Wellbutrin, a medication used to treat depression. (EH176).

Michael Teal, a practicing attorney for twenty-five years, was one of Raleigh's trial attorneys. (EH178, 233). He was aware from the beginning that the State would be seeking the death penalty. He was assisted by his partner, James Clayton, in preparing the defense case. (EH180). He had not previously handled a penalty phase in a capital case. (EH181). After the guilty pleas was entered, Teal's firm retained Dr. Upson, a psychologist, to determine if any statutory mental health mitigators applied. (EH182-83). Dr. Upson had approximately two months to prepare for the penalty phase and was provided with everything he requested, including any available court or police records. (EH183, 185). Dr. Upson's report did not specify if Raleigh was under the substantial domination of another. (EH191). Mr. Teal aware of the statutory aggravators and mitigators, and assisted the psychologist he hired in these areas. (EH199). He did not specifically ask Dr. Upson if Raleigh met the criteria for antisocial personality disorder as specified in the DSMR IV. (see note 1). Raleigh did not indicate that he had been a victim of sexual abuse. Mr. Teal stated, " ... I had tried to discuss with him ... some things ... he wished not to comment on." (EH206). He and his partner, James

Clayton, discussed Raleigh's decision to plead guilty to two counts of murder on several occasions. (EH210). After entering a change of plea, it was the defense's intention to waive the jury in the sentencing phase, even though "Judge Foxman had presided over death penalty cases before" and he had imposed the death penalty in several other cases. (EH210, 211). In addition, " ... a lot of the evidence was extremely graphic ... Mr. Raleigh had been indicted for another homicide ... we just thought we could eliminate some of the ... hysteria and the emotions ... if we could confine it to a judge making the ultimate decision." (EH212).[3] The defense was informed by the trial court that it "would provide two nonstatutory mitigators if a plea were entered." (EH214). He did not tell Raleigh that the trial judge would not give him the death penalty if he was the ultimate sentencer, but thought that Raleigh had a better chance with the judge. (EH216). In addition, he argued to have the felony murder aggravator dropped as the two burglary counts were dropped. (EH217). He said, " ... we tried to use some strategy to save him." (EH219). Ultimately, he recommended that it would be in Raleigh's best interest to plead guilty.(EH222).

Subsequent to Raleigh's death sentence, Teal and Clayton

[3]The indictment for the murder of Lauralee Spears was ultimately dismissed. (EH242, 347).

visited him in prison, reminding him that the trial judge had never made a specific promise that there would be no death penalty, or that there would be an override to a life sentence (EH227-28). Prior to the penalty phase, the defense moved to sever this case from that of the co-defendant, Domingo Figueroa, believing that Figueroa was " ... basically the ringleader and that he had dominated and controlled Bobby." (EH229). Mr. Teal was confident that he had relayed to Raleigh, both before and after he entered his guilty plea, that co-defendant Figueroa would testify against him. (EH232).

On cross-examination, Teal said he worked with other mental health professionals "on a limited basis." (EH234). An additional consideration Raleigh gave to pleading guilty was the desire to protect his mother from testifying about statements he had made to her regarding his involvement. (EH234). He believed that Raleigh was the follower with regard to Domingo Figueroa and "he wanted to please Domingo." (EH236). Although Raleigh did not divulge any information regarding sexual abuse as a child, Teal would have alerted Dr. Upson had he (Raleigh) disclosed that type of information. (EH237). It was Raleigh's contention that he did not know what he was doing at the victims' trailer other than Domingo drove him out there, and "that was something we were trying to use in our favor." (EH240). Teal said there

were "no side deals, no understandings with anybody" regarding Raleigh's decision to plead guilty. The defense thought they had a better chance with a judge rather than a jury.(EH241). In addition, the defense was aware that the State intended to use Domingo Figueroa as a witness against Raleigh at the guilt phase. (EH244).

On re-direct, Teal stated that Raleigh's plea was made freely and voluntarily. Despite the chance that Raleigh's mother might have had to testify regarding statements Raleigh made to her, "I felt he was still making an informed decision even with that in mind." (EH246, 247).

Elizabeth Blackburn, the prosecutor in this case, sought the death penalty for Raleigh and co-defendant Domingo Figueroa, from the beginning. (EH265, 267). It was unacceptable to the State to accept a guilt plea from Raleigh in exchange for a life sentence without the possibility of parole. In addition, the State sought to have Raleigh's mother, Janice Figueroa, answer questions with regard to her knowledge of the case.(EH268). Had she not answered the questions, the State would have sought sanctions against her - - this fact was made known to the defense. (EH269).[4] Regarding the guilty pleas, the burglary

[4]The law at that time would have subjected Mrs. Figueroa to a jail term of up to six months for a contempt charge. (EH269).

charges were to be dropped as part of the plea deal. (EH274). It was also the State's position that there should be an advisory jury. (EH276).

It was the State's theory that Raleigh killed both of the victims in order to eliminate potential drug competition. (EH277).

Although there was evidence that Raleigh had been drinking on the night of the murders, Blackburn did not concede that Raleigh was intoxicated at the time he murdered the two victims. (EH278-79).

On cross-examination, Blackburn testified that there was no evidence in the State's possession that would have exculpated Raleigh or incriminated Figueroa, that was not previously provided to the defense - - in her words, "Everything was disclosed." (EH302). In addition, the same evidence was relied on in both Raleigh's and Figueroa's trials. (EH303).

James Alexander, now in private practice, was the former elected State Attorney for the Seventh Circuit during the pendency of Raleigh's trial. (EH304-05). He did not recall being involved in any plea negotiations with Raleigh's counsel but assisted Elizabeth Blackburn with co-defendant Figueroa's trial. (EH305, 306). A plea deal was not going to be considered for Figueroa until after the completion of Raleigh's trial.

Alexander testified, "I was afraid he'd double-cross us and exonerate Raleigh ... I didn't trust ... any defendant in that case." (EH306). During Figueroa's trial, Alexander told the jury that Figueroa made a statement to his uncle that "I killed one and Bobby killed one." (EH317).[5]

On cross-examination, Alexander stated that these killings occurred because " ... Raleigh had had the fight earlier in a bar and because Raleigh was upset and ticked off about what happened in that fight and he wanted revenge. And it was because of Raleigh that he went and got a gun, and it was because of Raleigh they went to the residence where the ... two victims lived. It was all to avenge ... Raleigh's honor for what happened in this barroom fight earlier that night. So everything was done at the behest of Raleigh." (EH318-19). There was physical evidence in this case as well as the conflicting statements of Raleigh and Figueroa. (EH319). As Alexander said, "Each defendant was pointing the finger at the other one." (EH320).

James Clayton, was Raleigh's other trial attorney. (EH331).[6] It was the defense's contention that Bobby Raleigh was "under

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[5]Douglas Cox and Timothy Eberlin were the victims. (EH309).

[6]James Clayton is currently a Circuit Court Judge for the Seventh Circuit and formerly Michael Teal's partner. (EH331, 332).

the dominative control of Mr. Figueroa." (EH334). He bargained with the State to have the burglary charges "nol-prossed" because he ... did not want the jury to consider burglary as an additional aggravator. (EH336). There was, however, no agreement with the State that it would not pursue a felony murder theory. (EH337). Michael Teal, handled the hiring of the mental health expert, Dr. Upson. (EH337). They did not pressure Raleigh to enter a plea, but Raleigh's love for his mother was a main factor in his decision to enter a plea. (EH340). Because of Raleigh's confession to his mother regarding his crimes, she was going to be called by the State as a witness. (EH341). Raleigh was very remorseful for what he had done, and the defense hoped that the jury would see this in the penalty phase. (EH343). He told Raleigh that it was best to waive the jury in the penalty phase as "... I would much rather roll the dice with the Judge than with a 12 man jury. (EH345). Although the Judge promised nonstatutory aggravators, he " ... never, ever promised an end result." (EH347).

On cross-examination, Clayton said he had handled a capital case prior to Raleigh's. (EH350). At the time the defense entered the guilty plea, he did not believe that the mental health issues were as significant as they are now. (EH352). Raleigh had indicated to him that he was not guilty of

premeditated murder. (EH354). He did not recall if he argued to the jury in the penalty phase that Raleigh was not guilty of felony murder. (EH355). Clayton relayed to his client that Mrs. Figueroa (Raleigh's mother)could potentially serve jail time if she did not testify should she be called as a witness. (EH358). He was aware of Judge Foxman's sentencing tendencies and knew that he had imposed the death penalty in other cases. In addition, Clayton was not aware of any other defense attorney in a capital case that had waived a jury in lieu of having Judge Foxman as the sentencer. (EH360). It was his belief, in this case, that it would have been a case "appropriate in front of a judge, not just Judge Foxman, any judge" in lieu of a jury. (EH361).

On re-direct, Clayton agreed that Raleigh had "no good options" prior to entering his guilty plea. (EH366). Based on his and Teal's advice, Raleigh entered his guilty plea. (EH368).

The Circuit Court entered its order denying the Amended Motion to Vacate on March 24, 2003. Raleigh filed a timely Notice of Appeal on April 11, 2003.

SUMMARY OF THE ARGUMENT

The “inadequate mental status” claim is procedurally barred, and, alternatively, meritless, as the collateral proceeding trial court found. This claim could have been, but was not,

raised on direct appeal, and the failure to timely raise the claim is a procedural bar under settled Florida law. Moreover, Raleigh has not demonstrated that he suffered a denial of due process.

The collateral proceeding trial court properly found that trial counsel were not ineffective in their preparation of the penalty phase mental state expert. Raleigh did not carry his burden under ***Strickland v. Washington*** because he established neither deficient performance on the part of counsel, nor prejudice resulting therefrom.

The collateral proceeding trial court correctly found that what Raleigh characterized as a "***Giglio***" violation was no more than inconsistent argument on the part of prosecution.

The collateral proceeding trial court properly found that trial counsel were not ineffective in their strategic decisions regarding the tape-recorded statement of Raleigh's co-defendant.

Raleigh's argument concerning the recommendation to plead guilty confuses the retroactivity determinations that are made by the State and Federal Courts. This Court makes the determination as to whether or not its own decisions are retroactive -- that determination is not the province of the federal courts. To the extent that Raleigh argues that counsel should have foreseen the result in ***Delgado***, the law is well-

settled that counsel cannot be ineffective for "failing" to foresee future developments in the law.

ARGUMENT

I. THE COLLATERAL PROCEEDING TRIAL COURT PROPERLY DECIDED THE INADEQUATE MENTAL STATUS EVALUATION CLAIM ON THE ALTERNATIVE GROUNDS OF PROCEDURAL BAR AND LACK OF MERIT.

On pages 5-31 of his brief, Raleigh asserts that he "was denied his rights under the federal constitution to a professional, competent, and appropriate mental health evaluation for use in the aid of his defense." This claim, which was raised as claim III in Raleigh's Rule 3.851 motion, is not only procedurally barred, but also meritless, as the trial court found. To the extent that this claim presents a legal question, such issues are reviewed *de novo*. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) (ineffective assistance of counsel claims are reviewed *de novo*); *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000). However, the findings of fact underlying the legal conclusions of the trial court are subject only to clear error review. *Cade v. Haley*, 222 F.3d 1298, 1302 (11th Cir. 2000); *Byrd v. Hasty*, 142 F.3d 1395, 1396 (11th Cir. 1998). The specific claim contained in Raleigh's brief is, for all practical purposes, a claim of "ineffective assistance of psychologist" which bears more than a passing resemblance to a

claim of ineffective assistance of counsel under *Strickland v. Washington*, 488 U.S. 668 (1984).[7]

> Raleigh's constitutional claim is procedurally barred because it could have been, but was not, raised on direct appeal.

The claim contained in Raleigh's brief is explicitly based on *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* is based solely on the due process component of the **Eighth** Amendment, and expressly refused to consider the applicability of the Sixth Amendment to the "ineffective assistance of mental state expert" claim. *Ake,* 470 U.S. at 87 n. 13. This Court, in deciding *Ake* claims, has decided that a claim of inadequate mental state expert assistance is a **direct appeal** claim which cannot be presented as an ineffective assistance of counsel claim to avoid the preclusive effect of the procedural bar. *See, Moore v. State*, 820 So. 2d 199, 202, n. 3 & 4 (Fla. 2002) (claim of inadequate mental state expert based on *Ake* is procedurally barred if not raised on direct appeal). This claim is procedurally barred under settled Florida law, and the Circuit Court's alternative denial of relief on that basis is an adequate and independent

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[7]Raleigh has presented no evidence which would bring his case under the holding in *Sireci v. State*, 502 So. 2d 1221, 1223 (Fla. 1987), because he has not even suggested that his psychologist at trial ignored clear indications of mental retardation or brain damage.

basis for the denial of relief which should be affirmed in all respects.

> Raleigh's claim has no legal basis because he cannot demonstrate how he was denied due process by the denial of his right to competent mental state assistance.

Despite the due process pretensions of Raleigh's brief, he cannot point to **any** ruling by the trial court which violated his due process right to competent mental status assistance. In order to prevail on his *Ake* claim (which is strictly a due process claim) Raleigh must do just that, and he has not. The collateral proceeding trial court found, and Raleigh does not dispute, that:

> . . . Dr. Upson testified that he met with Defendant two (2) separate times for a total of eleven and a half (11 ½) hours and that he also met with Defendant's mother, Janice Figueroa, for one (1) hour. [citation omitted]. Dr. Upson also reviewed a number of documents relative to Defendant's early education, school records, and medical records. [citation omitted]. As to the tests he performed, Dr. Upson testified that he administered a battery of approximately twenty (20) tests to Defendant. [citation omitted]. Dr. Upson went on to explain that in his testing he evaluates four major areas: intellectual functioning, achievement, neuro-psychological functioning, and personality. [citation omitted].
>
> In his discussion of the four areas, Dr. Upson noted the following deficiencies: (1) Defendant's speed of response was a little bit slower than to be expected for a person of his age [citation omitted]; (2) in the attention area, when Defendant is in a situation over

> a sustained period of time he begins to get bored, his impulsivity score begins to increase. [citation omitted]; and (3) while Defendant does not have a brain problem, when he is confronted with a situation of more cognitive demands, he begins to fall apart. [citation omitted].
>
> . . .
>
> Dr. Upson's final analysis of Defendant was the he is an individual who academically falls in the normal range; his linguistic skills are lower than his visual spatial skills, which means that he will be prone to handle learning and frustrating situations more in terms of action than in terms of reflective thought; his ability to achieve is within what one would predict from his ability; no significant neuro-psychological deficiencies with the exception of some difficulty in judgment, particularly where conceptual processes are involved; his personality characteristics are indicative of an individual who is somewhat insecure; e feels inferior at times; tends to lean and depend on others; he has been or he has responded in the past very much in terms of his perception of the needs and wants or others; he has some difficulty in traditional sex roles, interpersonal relations; he has some unresolved feelings relative to an interpersonal relationship with his mother; he appears to still perceive her very much in terms of wanting to get reinforcement which the record would indicate he did not get earlier in his life; he has deficiencies in the area of self-confidence; he is easily manipulated by others and may not always be aware of it; Defendant has a clinging, dependent relationship with his mother; his suicide attempt was probably more the result of poor judgment and manipulation than a serious suicide attempt; and lastly, Dr. Upson did find Defendant to be remorseful. [citation omitted].

(R590-91).

The trial court then discussed the evidentiary hearing testimony of Dr. Bordini, who is Raleigh's "new" expert, and

concluded, based upon the testimony at trial and the recent evidentiary hearing testimony, that:

> . . . Dr. Bordini's evaluation of Defendant, conducted approximately six (6) years after the murders, is simply a repackaging of Dr. Upson's findings. Although Dr. Bordini's evaluation may be packaged better and come across more favorable, it does not make Dr. Upson's evaluation inadequate. For instance, Dr. Upson testified that Defendant had symptoms of depression [citation omitted]; had difficulty differentiating between fantasy and reality [citation omitted]; is insecure [citation omitted]; passive, dependent, a follower [citation omitted]; has a close relationship with his mother [citation omitted]; had attempted suicide [citation omitted]; is remorseful [citation omitted]; tends to act before thinking [citation omitted]; fits criteria for anti-social personality, even though this may not be his diagnosis [citation omitted]; the use of alcohol on the night of the murders may have impacted his neuro-psychological function [citation omitted]; was only nineteen (19) years old at the time of the murders [citation omitted]; and showed some allegiance to Domingo Figueroa [citation omitted].

(R593-94).

When stripped of its pretensions, Raleigh's claim fails because the "new" mental state testimony is simply no different in substance from that presented at sentencing. As the trial court found, Dr. Bordini did not find that Raleigh is mentally retarded or that he suffers from some sort of organic brain damage.[8] (R593). Moreover, as the trial court found, Dr. Upson's

[8]Dr. Bordini testified that the expert at trial determined Raleigh's IQ to be 98, which is in the normal range of intelligence. (EH147). Raleigh has not carried his burden under *Ake*. *Jones v. State,* 845 So. 2d 55 (Fla. 2003). Dr. Bordini did

testimony was affected by Raleigh's refusal to disclose facts to him. Dr Upson cannot be criticized for not knowing matters that Raleigh would not disclose, and it stands reason on its head to suggest to the contrary. (R595). In fact, the only significant difference between the testimony of the experts was that Dr. Bordini was willing to offer a legal opinion that the statutory mental mitigating circumstances applied to Raleigh. However, he qualified that opinion, perhaps inadvertently, by stating that Raleigh understood that he was killing someone and knew that it was wrong to do so, but that he had less time for "reflection" during the second murder. (R593). Regardless of whether this sort of "expert" testimony is properly admitted, the collateral proceeding trial court was not obligated to credit it, and, in fact, found that the addition of Dr. Bordini's testimony would not affect the outcome at sentencing. (R594-95). *See, Rutherford v. State*, 727 So. 2d 216, 224 (Fla 1999); *Rose v. State*, 617 So. 2d 291, 293 (Fla. 1993). Under any view of the evidence, Dr. Upson's evaluation was not so deficient that it denied Raleigh the process to which he was due -- because he cannot identify and ruling by the court that resulted in a denial of due process, Raleigh has failed to establish a violation of any sort, much less one that entitles him to relief. *See, Clisby v.*

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no intelligence testing of his own. (EH147).

Jones, 960 F.2d 925, 934 (11th Cir. 1992) (*en banc*).

II. THE TRIAL COURT CORRECTLY FOUND THAT TRIAL COUNSEL WERE NOT INEFFECTIVE IN THEIR PREPARATION OF RALEIGH'S MENTAL STATE EXPERT.

On pages 31-36 of his brief, Raleigh argues that the trial court erroneously denied his ineffective assistance of counsel claim based upon counsel's "inadequate preparation" of Raleigh's mental state expert.[9] This ineffective assistance of counsel claim is subject to *de novo* review of the legal conclusions reached by the trial court. However, the underlying factual findings will be set aside only if clearly erroneous. See pages 21-22, above. For the reasons set out below, the trial court's order should be affirmed in all respects.

Claims of ineffective assistance of counsel are evaluated under the well-settled *Strickland v. Washington*, 466 U.S. 668 (1984), standard, which requires the defendant to demonstrate not only that counsel's performance was deficient, but also that he suffered prejudice as a result. This two-part standard is a conjunctive one -- the defendant must demonstrate both component parts in order to prevail. *Id.* Moreover, this standard is, and

[9]This claim was contained in Raleigh's post-conviction motion as Claim IV, and was addressed by the Circuit Court along with Claim III in the March 24, 2003, order denying relief. (R588-594).

is supposed to be, a high one -- the cases in which a defendant can properly prevail on an ineffectiveness claim are, in the words of the Eleventh Circuit, "few and far between." *Waters v. Thomas*, 46 F.3d 1506 (11th. Cir. 1995). The *Strickland* standard is one of reasonableness -- the standard is not what the best lawyer would have done, or even what a **good** lawyer would have done. Instead, the focus is on whether the lawyer's performance was reasonable under the circumstances -- if it was, the ineffectiveness claim fails. *Waters, supra*.

In its order denying relief, the trial court stated:

> Furthermore, Dr. Upson's testimony was limited by Defendant's own actions, *i.e.,* there is uncontradicted testimony that Defendant was reluctant to discuss with Dr. Upson his prior sexual abuse and failed to mention that he beat Timothy Eberlin with a gun. Therefore, neither Dr. Upson nor trial counsel can be faulted. *See Walton v. State*, 2003 WL 544073 (Fla. Feb. 27, 2003) (if defendant does not reveal information, counsel cannot be faulted). Also, Mr. Teal [trial counsel] testified at the evidentiary hearing that, to his knowledge, he gave Dr. Upson all the information he requested. Whatever documents he requested, Mr. Teal furnished. This testimony was uncontradicted. Therefore, the Court finds that Defendant did receive a professional, competent, and appropriate mental health evaluation for use in the aid of his defense; that counsel provided all background information to Dr. Upson necessary for an adequate and appropriate evaluation; and that trial counsel adequately investigated and presented mitigation sufficient to challenge the State's competent substantial evidence. Defendant's death sentence is reliable.

(R595).

Those findings by the trial court, which are uncontroverted and which are not clearly erroneous, establish that Raleigh failed to carry his burden of proving that counsel's performance was deficient. Because counsel's performance was not constitutionally deficient, Raleigh cannot meet the performance prong of *Strickland*, and his ineffective assistance of counsel claim fails. Moreover, the preceding seven pages of the trial court's order contain a detailed discussion of the trial testimony of Dr. Upson and the post-conviction testimony of Dr. Bordini -- when the testimony of the two mental state experts is considered, it is clear that both witnesses testified to essentially the same opinions and conclusions (with the exception of certain facts that Raleigh kept from Dr. Upson) -- because there is no functional difference in the opinions and conclusions of the two experts, there can be no deficient performance, nor can Raleigh have suffered any prejudice. Under these facts, the ineffective assistance of counsel claim fails, and the trial court properly denied relief.

To the extent that further discussion is necessary, even considering Dr. Bordini's testimony in the light most favorable to Raleigh, nothing contained therein called the trial court's sentencing order into question or established any additional mitigating factors beyond those found at the time of sentencing.

(R594-95). The trial court rejected the mitigators of extreme mental or emotional disturbance; extreme duress or substantial domination of another; and substantial impairment in ability to appreciate the criminality of his conduct and conform to the requirements of law. *Id.* Nothing presented at the post-conviction hearing established those statutory mitigators, and Raleigh has failed to establish either of the two prongs of *Strickland.*

III. THE COLLATERAL PROCEEDING TRIAL COURT PROPERLY APPLIED AND FOLLOWED BINDING PRECEDENT WHEN IT DENIED RALEIGH'S "*GIGLIO*" CLAIM.

On pages 36-41 of his brief, Raleigh argues that he is entitled to relief based upon the introduction of co-defendant Figueroa's statement. The collateral proceeding trial court framed the issue in the following way:

> In Claim II, Defendant alleges that the State knowingly presented false evidence in violation of Defendant's rights under the United States Constitution and applicable provisions of the Florida Constitution. Specifically, Defendant alleges that Domingo Figueroa's statement was not revealed to be false until after his penalty phase, but before his sentencing. Co-defendant Domingo Figueroa's statement was introduced during his (Mr. Figueroa's) trial and State Attorney, James Alexander, argued that the statement was untruthful on a number of points; yet, the same statement was admitted in Defendant's case, and at that time, the State argued consistently with Mr. Figueroa's statement.

(R587). The trial court found that Raleigh was doing no more

than citing to inconsistent **argument** rather than inconsistent evidence, and denied relief.[10] That factual resolution is supported by competent substantial evidence, and should not be disturbed. *See, Way v. State*, 760 So. 2d 903, 911 (Fla. 2000); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

In *State v. Parker*, 721 So. 2d 1147 (Fla. 1998), this Court addressed the distinction between inconsistent argument and "necessarily contradictory evidence." In holding that inconsistent **arguments** do not amount to a constitutional error, this Court stated:

> In denying this same claim, the Eleventh Circuit concluded in *Parker IV* that it was not improper for the State to take inconsistent positions *so long as it did not involve the use of necessarily contradictory evidence.* The court found that the State acted properly in Parker's case because, due to lack of evidence, the only inconsistency was in the state's alternative arguments. *Parker IV,* 974 F.2d at 1578. As that court stated:
>
> > [N]o due process violation occurred, because there was no necessary contradiction between the state's positions in the trials of the three co- defendants. **Given the uncertainty of the evidence, it was proper for the prosecutors in the other co-defendants' cases to argue alternate theories as to the facts of the murder. The issue of whether**

[10]In his brief, Raleigh cites to Justice Lewis' concurrence in *Fotopoulos v. State*, 838 So. 2d 1137 (Fla. 2002), as support for his position, after conceding that *State v. Parker*, 721 So. 2d 1147, 1151 (Fla. 1998), controls. *Fotopoulos* was decided in the context of a ineffective assistance of counsel claim -- this case raises a substantive claim, and, for that reason, *Fotopoulos* does not control.

> **the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendants' juries.**

State v. Parker, 721 So. 2d at 1151. [emphasis added].[11]

In denying relief on Raleigh's claim, the trial court stated:

> Defendant only cites to numerous statements within the closing argument of State Attorney James Alexander, in Mr. Figueroa's trial, to show that the State argued facts in contradiction to Mr. Figueroa's statement. [citation omitted]. However, such statements do not amount to false evidence. As the Florida Supreme Court has recognized, it is not improper for the State to take inconsistent positions so long as it does not involve the use of necessarily contradictory evidence. [*citing Parker, supra*].

(R587). The trial court's order is not clearly erroneous, is supported by the record of the closing argument in Figueroa's trial (which was before the trial court), and should not be disturbed. *VanPoyck v. Florida Department of* Corrections, 290 F.3d 1318 (11th Cir. 2002); *Jennings v. State*, 718 So. 2d 144 (Fla. 1998).

IV. THE COLLATERAL PROCEEDING TRIAL COURT CORRECTLY FOUND THAT TRIAL COUNSEL WERE NOT INEFFECTIVE FOR "FAILING" TO OBJECT TO THE INTRODUCTION OF THE TAPE-RECORDED STATEMENT OF CO-DEFENDANT FIGUEROA WHICH WAS INTRODUCED DURING THE PENALTY PHASE OF RALEIGH'S TRIAL.

On pages 41-51 of his brief, Raleigh argues that trial counsel were ineffective for "failing to object" to the

[11]This Court affirmed the trial court's order granting Parker a new trial -- however, the "inconsistent argument" component of *Parker* was not disturbed by the Court. *Parker, supra.*

introduction of Figueroa's tape-recorded statement given to law enforcement.[12] Because this is an ineffective assistance of counsel claim, the factual findings of the trial court are reviewed for clear error, and the conclusions of law are reviewed *de novo.* See pages 21-22, above. This claim concerns matters of trial strategy, and, because that is so, this claim is highly fact-specific. The trial court properly concluded that Raleigh's claim amounted to no more than disagreement with trial counsels' strategic decisions, and denied relief. That disposition is correct, and should be affirmed in all respects.

The law is well-settled that informed strategic decisions by counsel are virtually unchallengeable, and will rarely, if ever, constitute ineffective assistance of counsel. *Strickland, supra,* at 690. In its order denying relief, the trial court discussed the circumstances through which the Figueroa transcript was introduced into evidence, and then stated:

> At the evidentiary hearing, Defendant's trial counsel, Michael Teal and James Clayton, both testified that they did not want Domingo Figueroa to testify personally at Defendant's penalty phase proceeding because they would not have any control over what he testified to. They believed his live testimony may have been **more** damaging than his recorded statement. Instead, they preferred that the statement come in because parts of it could be used to support Defendant's case, *i.e.,* to show the control or influence Domingo Figueroa had over Defendant. Hence, the reason the statement was first mentioned by defense counsel during their cross-examination of Investigator Horzepa. [citation omitted].
>
> Therefore, it is clear to this Court that Defendant's

[12]This claim was Claim I in the post-conviction motion.

> claim, that counsel failed to object, amounts to nothing more than disagreement with defense counsel's strategy and is insufficient in light of the testimony at the evidentiary hearing. *Stewart v. State,* 801 So. 2d 59, 65 (Fla. 2001). "Counsel cannot be deemed ineffective merely because current counsel disagrees with trial counsel's strategic decisions." *Id.* "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision reasonable under the norms of professional conduct." *Id., citing, Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000). The testimony of Mr. Teal and Mr. Clayton clearly indicates that they made an informed and reasoned decision not to object to the admission of Domingo Figueroa's statement. Defendant has failed to show that counsel's performance was deficient.

(R586-87). The collateral proceeding trial court's finding of fact are not clearly erroneous, and the determination that counsel's strategic decisions were informed and reasonable are legally correct. It was not unreasonable for counsel to prefer that a known transcript come into evidence instead of an unpredictable and potentially uncontrollable co-defendant, especially when aspects of the recorded statement were helpful to Raleigh. The most that Raleigh has done is demonstrate that, with the benefit of time and a made record, present counsel would not defend this case in this way. However, that is not the standard by which ineffective assistance of counsel claims are evaluated -- Raleigh has not demonstrated that trial counsel's decision was professionally unreasonable, **nor** has he demonstrated prejudice as a result of counsel's strategic decisions. Because that is so, Raleigh has not carried his two-part burden of proof under *Strickland. See, Waters v. Thomas*, 46 F. 3d 1506 (11th Cir. 1995).

Finally, to the extent that further discussion of this claim is necessary, Figueroa was not called as a witness during the post-conviction proceeding -- Raleigh has not demonstrated what Figueroa's live testimony would have been, and has therefore failed to carry that component of the burden of proof, as well. And, this testimony came during the penalty phase of Raleigh's capital trial, and was therefore subject to the relaxed evidentiary rules that apply to such proceedings -- there is no indication that the transcript could ultimately have been successfully excluded. This claim is nothing more than a speculative challenge to the reasoned strategic decisions made by experienced trial counsel. Their performance was not objectively unreasonable, nor was it prejudicial. Raleigh cannot meet either prong of the *Strickland* standard, and there is no basis for relief. The trial court should be affirmed in all respects.

V. THE COLLATERAL PROCEEDING TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL WERE NOT INEFFECTIVE FOR RECOMMENDING THAT RALEIGH PLEAD GUILTY TO FIRST DEGREE MURDER.

On pages 51-52 of his brief, Raleigh asserts that trial counsel were ineffective for recommending that he plead guilty to two counts of first degree murder. However, this argument is not based upon counsel's actions, but rather is that the **federal** courts have not decided whether this Court's decision in *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), is retroactive, and that the collateral proceeding trial court was incorrect when it

followed this Court's express statement that *Delgado* is **not** retroactive and does **not** apply to cases that became final before *Delgado* was decided on August 24, 2000. According to Raleigh, his "trial counsel were deficient in failing to object to an inadmissible statement" that is not identified in the *Initial Brief.*

In *Delgado*, this Court expressly ruled that that decision did **not** apply retroactively:

> This opinion will not, however, apply retroactively to convictions that have become final. *See Witt v. State,* 387 So.2d 922, 928-31 (Fla.1980). [FN7]
>
> > FN7. The instant case does not meet the second or third prongs of the *Witt* test.

Delgado v. State, 776 So. 2d 233, 241 (Fla. 2000). This Court's decision could hardly be clearer, and it could hardly be clearer that the trial court should not be placed in error for **following** the **explicit** decision of this Court.

Despite this Court's clear holding that *Delgado* is not retroactively applicable to final convictions, Raleigh makes the legally baseless argument that he counsel were deficient and that he is therefore entitled to relief because the "federal courts have not addressed whether *Delgado* is retroactive." The law is well-settled that Federal courts determine the retroactivity of **federal** decisions, and it is equally clear that this Court determines the retroactivity of its own decisions

under State retroactivity principles. The Federal Courts will not have the occasion to address whether *Delgado* is retroactive, and the argument to the contrary makes no sense.[13]

To the extent that further discussion of the ineffective assistance of counsel claim is necessary, trial counsel cannot be ineffective for "failing" to foresee the result in *Delgado*, which came three years after this case was affirmed on direct appeal. *Pitts v. Cook*, 923 F.2d 1568 (11th Cir. 1991). And, to the extent that Raleigh asserts that counsel were "deficient in failing to object to an inadmissible statement," the brief neither identifies that statement nor explains why it is supposed to be inadmissible. *Initial Brief*, at 52. Because that is so, this claim is insufficiently briefed in addition to having no legal basis. The collateral proceeding trial court should be affirmed in all respects.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Appellee respectfully requests that all

[13]The United States Supreme Court is the final word on the retroactivity of federal decisions, and, in fact, is the only court that can make such a determination for federal purposes. *Teague v. Lane*, 489 U.S. 288, 310 (1989); *Tyler v. Cain*, 533 U.S. 656, 663 (2001). As a co-equal court of last resort, this Court likewise has the last word in the retroactivity of its decisions.

requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **Kenneth M. Malnik**, Esq., Malnik & Salkin, P.A. 1776 N. Pine Road, Suite 216, Plantation, Florida 33322, on this _____ day of April, 2004.

Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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