

IN THE SUPREME COURT OF FLORIDA

JAMES D. FORD,

Appellant,

v.

Case No. SC04-1611

Lower Tribunal No. 97-351-CF

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT  
OF THE TWENTIETH JUDICIAL CIRCUIT,  
IN AND FOR CHARLOTTE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE AND FACTS.....	1
SUMMARY OF THE ARGUMENT .....	12
ARGUMENT.....	13
ISSUE I .....	13
WHETHER THE TRIAL COURT PROPERLY DENIED FORD’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE VOLUNTARY INTOXICATION DEFENSE.	
ISSUE II .....	24
WHETHER THE TRIAL COURT PROPERLY DENIED FORD’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE WAIVER OF SPEEDY TRIAL.	
CONCLUSION.....	29
CERTIFICATE OF SERVICE .....	29
CERTIFICATE OF FONT COMPLIANCE.....	29

TABLE OF AUTHORITIES

<u>Brown v. State,</u> 829 So. 2d 975 (Fla. 1st DCA 2002) .....	27
<u>Burke v. State,</u> 855 So. 2d 207 (Fla. 1st DCA 2003) .....	27
<u>Chandler v. United States,</u> 218 F.3d 1305 (11th Cir. 2000) .....	17
<u>Damren v. State,</u> 838 So. 2d 512 (Fla. 2003) .....	19
<u>Dufour v. State,</u> 905 So. 2d 42 (Fla. 2005) .....	22
<u>Florida v. Nixon,</u> 543 U.S. 175 (2004) .....	18, 19
<u>Ford v. Florida,</u> 535 U.S. 1103 (2002) .....	4
<u>Ford v. State,</u> 802 So. 2d 1121 (Fla. 2001), <u>cert.</u> <u>denied</u> , 535 U.S. 1103 (2002) .....	4
<u>Jones v. Barnes,</u> 463 U.S. 745 (1983) .....	26
<u>Jones v. State,</u> 855 So. 2d 611 (Fla. 2003) .....	22
<u>Koon v. State,</u> 619 So. 2d 246 (Fla. 1993) .....	20, 21
<u>Patton v. State,</u> 878 So. 2d 368 (Fla. 2004) .....	22
<u>Rose v. State,</u> 675 So. 2d 567 (Fla. 1996) .....	16
<u>Ryland v. State,</u> 880 So. 2d 816 (Fla. 1st DCA 2004) .....	27
<u>State ex rel. Gutierrez v. Baker,</u> 276 So. 2d 470 (Fla. 1973) .....	26
<u>Stephens v. State,</u> 748 So. 2d 1028 (Fla. 1999) .....	13, 24
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984) .....	passim

<u>Valle v. State,</u> 705 So. 2d 1331 (Fla. 1997) .....	16
<u>Wiggins v. Smith,</u> 539 U.S. 510 (2003) .....	20

STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.851.

Defendant Ford was convicted of two counts of first degree murder, sexual battery with a firearm, and child abuse, and was sentenced to death on June 3, 1999. The facts are outlined in this Court's opinion affirming Ford's convictions and sentences:

James ("Jimbo") Dennis Ford and Greg Malnory were co-workers at the South Florida Sod Farm in Charlotte County. On Sunday morning, April 6, 1997, Ford made plans to go fishing later that day with Greg and his wife Kim on the sod farm. The relevant facts are set forth in the trial court's sentencing order:

In the early afternoon of April 7, 1997, an employee of the South Florida Sod Farm made a gruesome discovery on the grounds of the 7,000 acre farm located in a remote area of Charlotte County. At the scene of these crimes, authorities found the pickup truck owned by Greg and Kim Malnory in the middle of a field. Some distance away, they found the body of Greg Malnory. He had been shot in the head from behind by what was later determined to be a .22 caliber rifle.

The shooting evidently occurred somewhere in the vicinity of the crime scene, perhaps between the Malnorys' truck and a nearby pond. Greg then apparently staggered out into the middle of the field, followed by the Defendant.

The Defendant then inflicted at least seven blunt force injuries to the head and face of Greg Malnory with what has been described by the medical examiner as a blunt instrument consistent with an axe. Greg was found lying on his back in the middle of the field

with his throat slit nearly from ear to ear, so deeply that underlying muscle tissue was exposed. The massive amount of blood found on Greg Malnory's chest and shirt lead [sic] to the inescapable conclusion that Greg was first shot in the head, that the bullet only disabled him, and that the Defendant then savagely killed him by beating him to death and slitting his throat while Greg was lying on his back in the middle of the field.

The body of Kimberly Malnory was found near the truck. Evidence revealed the existence of nine blunt force injuries to her head, one of which fractured and penetrated her skull. Defensive wounds were found on the backs of Kim's arms indicating that she put up a struggle. There was also evidence of two oval discolorations on the superficial tissues on the inside of Kimberly Malnory's thighs which were suggestive of thumb prints. These marks were made by the Defendant while Kimberly Malnory was alive.

DNA testing revealed the presence of the Defendant's semen inside Kimberly Malnory and on her shirt. The single piece bathing suit that Kimberly Malnory was wearing under her shirt at the time of the killings had been sliced clean through the crotch as if with a sharp knife. Before raping Kimberly Malnory, the Defendant took the weapon he had used to shoot Gregory Malnory, a .22 caliber single-shot, bolt-action rifle named "old Betsy," and reloaded it with another bullet. A cast of Kimberly Malnory's pallet [sic] revealed that the Defendant then stuck the end of the barrel of the rifle inside Kimberly Malnory's mouth and pulled the trigger.

Authorities also discovered the Malnorys' 22 month old baby girl, Maranda, in the car seat inside the Malnorys' truck. The baby had been strapped inside the vehicle for well over 18 hours with the doors wide open,

exposed to the elements overnight and for much of the next day. Little Maranda was found with mosquito bites over most of her body and her mother's blood over both the front and back of her clothes and on her shoe. . . .

Although the evidence is in some dispute as to the exact series of events which occurred at the sod farm on the afternoon of April 6, 1997, it is not necessary for the Court to determine the precise sequence by which these horrible crimes were committed . . . .

Suffice it to say that the Court is convinced that Gregory Malnory was initially shot in the head by the Defendant at an angle slightly from behind. The Defendant may have then hit Kimberly Malnory in order to disable her. At some point the Defendant realized that Greg was not yet dead, and then the Defendant followed him out into the middle of the field where he bludgeoned him and slit his throat.

While the Defendant was completing the killing of Gregory Malnory, Kimberly Malnory did what she could to save Maranda. This explains the presence of her blood on the baby. Upon his return to the pickup truck, the Defendant then raped Kimberly Malnory, brutally beat her and executed her with his rifle.

Evidence of guilt presented by the State showed the following: Ford was seen with the victims in the area of the crime just prior to the killings; Ford was seen that evening in a distracted state with blood on his face, hands, and clothes; he was observed the next day, Monday, with scratches on his body; the rifle stock of a .22 caliber single-shot Remington rifle that belonged to Ford was found in a drainage ditch in the area where Ford's truck ran out of gas Sunday evening; DNA from human debris found inside an Old Timer's folding knife recovered from Ford's bedroom matched Greg Malnory's DNA type; DNA from a stain on a

shoe in Ford's truck matched Kim Malnory's type; DNA from a stain on the seat cover in Ford's truck matched Kim's type; DNA from semen found on the shirt Kim was wearing when murdered matched Ford's type; DNA from vaginal swabs taken from Kim matched Ford's type.

Ford v. State, 802 So. 2d 1121, 1125-26 (Fla. 2001), cert. denied, 535 U.S. 1103 (2002). Ford was convicted as charged. During the penalty phase of the trial, Ford presented more than two dozen witnesses, including two mental health professionals and several family members and friends. The jury recommended death for each murder by an eleven-to-one vote. The court imposed a sentence of death on each count, giving great weight to four aggravating circumstances (especially heinous, atrocious, or cruel; cold, calculated, and premeditated; during the commission of a sexual battery; prior capital felony conviction), over numerous statutory and nonstatutory mitigating circumstances.

Following this Court's affirmance, Ford sought certiorari review in the United States Supreme Court, challenging this Court's ruling with regard to his claim that the trial court failed to fully consider the mitigating evidence presented; review was denied on May 28, 2002. Ford v. Florida, 535 U.S. 1103 (2002).

Ford filed a motion for postconviction relief on May 28, 2003, presenting three claims of ineffective assistance of



counsel (I: 1-45). An evidentiary hearing was conducted on May 12, 2004, before the trial judge, the Honorable Cynthia Ellis (III: 250-358). Ford abandoned his third claim, and testified in support of his two remaining claims (III: 257, 260-61, 264-89). According to Ford, his attorneys were ineffective for waiving his right to a speedy trial without his consent, and in pursuing a defense of intoxication, which Ford believed amounted to an admission of guilt.

Ford testified that his retained attorney, Paul Sullivan, did not discuss his speedy trial rights until after a continuance had already been sought and granted to the defense (III: 267). Once Ford became aware of his right to a speedy trial, he advised his attorneys that he did not want to waive this right (III: 267-68). He filed a *pro se* notice attempting to invoke a speedy trial or discharge, which was deemed a nullity since he was represented by counsel (III: 269, 284; DA: V20/109-125).<sup>1</sup> He then insisted that counsel file a speedy trial notice, which was done, but the court ruled that speedy trial had been waived at that point (III: 270, 284; DA: V20/126-145).

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<sup>1</sup> References to the three-volume record in this appeal follow the format used in Ford's initial brief, with the volume number designated by a Roman numeral followed by the relevant page numbers. References to the direct appeal record, Ford v. State, Florida Supreme Court Case No. 95,972, are designated as "DA" followed by the volume number/page numbers.

Ford described a "heated discussion" which occurred in a small room off the courtroom at the time of a pretrial hearing. Ford was upset that his attorneys were seeking a continuance, contrary to his desire for a speedy trial (III: 272). His attorneys convinced him that additional time was necessary, and he agreed to waive his speedy trial right in open court (III: 272-73). However, he did not really want to waive his right, and did not think his waiver was free and voluntary (III: 273, 276). Ford testified that, had he been permitted to secure a speedy trial, the State would not have been able to present as much evidence against him as it was ultimately able to present, including the DNA evidence (III: 275-76). He understood that his attorneys needed time to prepare his case, and he did not object to them taking the time necessary (III: 282-83). He also acknowledged that his attorneys may not have been able to prepare for the penalty phase if he did not waive speedy trial, and he admitted that he wanted the State to take whatever time was necessary for the DNA testing, as he believed the tests would prove his innocence (III: 287-89).

Ford also testified that he instructed attorney Sullivan not to pursue a voluntary intoxication defense (III: 278-79). This was apparently in a discussion at trial, as Ford related that a juror had indicated a concern about having to acquit Ford

if he had been drunk (III: 278-79). Ford believed presentation of this defense was prejudicial because he did not want to admit to anything (III: 281). Ford acknowledged, however, that his attorneys did not admit that he had committed any crime, and that he understood the defense theory was that he did not commit the crimes, and even if he had some culpability, it could not have happened as the State suggested, because Ford was too drunk to do it (III: 288-89).

The State presented Ford's trial attorneys, Paul Sullivan and Paul Alessandroni, to counter Ford's claims. Sullivan was a former prosecutor, and had been in private practice since 1991 (III: 292). Sullivan brought in Alessandroni to assist with the trial, as Alessandroni had more experience with capital cases both as a former prosecutor and a private defense attorney (III: 292, 328, 342). In addition, Sullivan assembled a defense team, including a mitigation specialist and his assistant, mental health experts, a blood spatter expert, and a group of forensic scientists to explore medical and DNA issues (III: 293-95).

Both Sullivan and Alessandroni were unequivocal as to the need to waive speedy trial in order to properly prepare this case for trial (III: 304-05, 342-43). There were numerous witnesses to depose, including many relating to complicated scientific and forensic issues, and a wealth of mitigation to be

explored (III: 304-05, 317, 320-21). According to Sullivan, he discussed the waiver implications before he requested the continuance at the first docket sounding, and Ford did not object at that time (III: 303-04). However, Ford later became frustrated with the lack of progress in the case, and requested that Sullivan assert his speedy trial rights (III: 305-06).

Sullivan recalled that the speedy trial issue was a continuing source of disagreement between him and Ford (III: 306-07). He stated he did not seriously consider a strategy of refusing to waive speedy trial, because he thought the State would just expedite the necessary testing, and the defense would have no way to counter the evidence (III: 306, 317, 321). Additionally, he recalled that Ford wanted to see the DNA testing completed, as Ford believed it would be exculpatory (III: 325).

On the other hand, Sullivan did not recall any conflict with Ford over the defense strategy regarding voluntary intoxication (III: 297-98, 323). Sullivan testified that the defense theory -- asserting that Ford had not killed the victims, but suggesting that even if he had some responsibility, his intoxication precluded premeditation -- had been discussed and explained to Ford, and Ford had no objections or disagreements with the strategy as outlined (III: 297, 325).

Sullivan acknowledged that Ford had denied having been drunk on the day of the murders (III: 300, 303).

Sullivan testified that the defense "kept our eye to the penalty phase" in searching for a guilt phase defense, as the State's case for guilt was strong (III: 296). A voluntary intoxication defense seemed appropriate in light of Ford's social history and drinking habits (III: 296). Ford was not an alcoholic, but he drank a lot (III: 296). Sullivan felt early in the case that Ford probably would not testify, and he needed a defense he could develop through the State's case (III: 296). He was aware of the evidence of alcohol consumption the day of the murders, and thought this could help build the penalty case, but did not consider the anecdotal information to be sufficient to take to a toxicologist on the issue of guilt (III: 296-97, 300). Sullivan indicated that the defense did not have a lot to work with, and felt hindered by Ford's insistence of innocence, knowing they could not use voluntary intoxication in the traditional sense and admit the crime (III: 297-98). He identified State Exhibits 1 and 2, internal defense memorandums generated prior to trial, outlining possible defense strategies and pretrial issues (III: 299, 302).

Paul Alessandrone also testified as to his participation on the defense legal team. By the time Alessandrone had joined the

team, speedy trial had been waived (III: 334-35). However, Alessandrone noted that every continuance sought by the defense was necessary in order to prepare the case (III: 335). Ford was upset about some of the continuances, but he reluctantly agreed not to pursue his speedy trial rights when it was explained that counsel needed more time to prepare (III: 335-36, 341-42). Alessandrone stated there was "no way" to prepare the case within the statutory speedy trial period (III: 342-43).

Alessandrone testified the voluntary intoxication defense was considered, and one of the experts had suggested the possibility that Ford had experienced an alcoholic blackout (III: 330). However, Ford's insistence that he was not involved in the murders limited them to arguing that due to his intoxication, he could not have committed the crimes (III: 331). The defense was aware that evidence of Ford's drinking would be presented during the State's case, and they wanted to exploit this to their benefit (III: 333). According to Alessandrone, Ford appeared to agree with the strategy and never instructed them not to use it, although Ford denied that he was drunk on the day of the murders (III: 332-33, 338-39).

Following the evidentiary hearing, the trial court issued an order, outlining the testimony presented and denying Ford's

claims of ineffective assistance (III: 359-77). This appeal follows.

## SUMMARY OF THE ARGUMENT

1. The trial court did not err in rejecting Ford's claim of ineffective assistance of counsel premised on his attorneys' strategy with regard to the voluntary intoxication defense. The record reflects that the intoxication defense was used in a manner which respected Ford's claim of innocence. Ford failed to establish that no reasonable attorney would have defended him with the strategy used at trial. No deficiency or prejudice can be found on the facts of this case.

2. The trial court did not err in rejecting Ford's claim of ineffective assistance of counsel premised on his attorneys' waiver of speedy trial. As Ford acknowledged, his attorneys could not have effectively prepared his case within the statutory time limits, and the decision to waive speedy trial was reasonable and necessary. No deficiency or prejudice can be found on the facts of this case.



## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED FORD'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE VOLUNTARY INTOXICATION DEFENSE.

Ford initially challenges the trial court's ruling that his attorneys provided constitutionally effective assistance in presenting a defense of voluntary intoxication. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

The trial court held that Ford's assertion that he did not authorize a voluntary intoxication defense was "moot" since no voluntary intoxication defense was actually put forth at trial (III: 374). Ford alleges that this language is contrary to the testimony of the State witnesses at the hearing, acknowledging that they asserted an intoxication defense to the extent they could argue that Ford didn't commit the crimes, and if he had some culpability, it didn't happen as the State described because he would have been too impaired (III: 297, 325, 331). According to Ford, the inconsistency between the court's finding that she "did not permit it as a defense in the guilt phase of the trial" and the trial attorneys' acknowledgement that they

incorporated a voluntary intoxication argument into their defense theory compels reversal. In fact, there is no contradiction between the court's comment and the testimony below, and, perhaps more importantly, the trial transcript supports both positions.

The direct appeal record clearly supports the testimony of the defense attorneys below. The primary defense theory was to question the adequacy of the State's case, focusing on mistakes committed in the collection, preservation, and testing of the physical evidence (DA: V33/2077-2111; V43/3613-3671). The defense sought to create reasonable doubt based on shortcomings in the State's case, particularly human error that diminished the force of the scientific evidence admitted. In conjunction with this defense, Ford's attorneys also presented testimony relating to Ford's consumption of alcohol on the day the victims were killed, including lay witness opinions that Ford seemed drunk (DA: V42/3461-65, 3474-75). The transcript of the defense closing argument is 58 pages long, and only nine pages from the end of the argument, attorney Sullivan mentioned Ford's drinking for the first time (DA: V43/3613-71). Sullivan told the jury that whoever killed the Malnorys could not have been in their right mind (DA: V43/3668). A special voluntary intoxication instruction was given, telling the jury that where a certain

mental state was required for a crime, it must consider whether the person was so intoxicated that he is incapable of forming that mental state (DA: V43/3704-06). Notably, Ford's alcohol consumption was not used, as he feared, as any admission of guilt (III: 324).

The trial court's ruling that voluntary intoxication was not used as a defense at trial is also supported by the direct appeal record. Although it was asserted as basis to find that the State had not proven premeditation or the intent required for the child abuse charge, it was not, and could not have been, offered as a defense to the sexual battery and felony murder charges (DA: V43/3706). In addition, it was not used as a defense to the premeditation in the traditional sense, in that it did not include any admission of any guilt (DA: V43/3662-71). Because it was not offered as an admission, and that was the reason Ford claimed in postconviction he did not authorize its use, the trial court's rejection of this claim was proper and fully supported by the record.

Furthermore, even if the intoxication defense had been presented in a manner contrary to Ford's desire, no Sixth Amendment violation can be demonstrated. Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In

Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. See generally, Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000).

The evidence presented at the hearing below clearly demonstrates the reasonableness of the defense strategy employed in this case. Ford's attorneys felt somewhat hindered in adopting a defense due to Ford's insistence that he had not committed the crimes (II: 96, 102; III: 297-98, 303). However, they believed that an appropriate defense could be offered by maintaining Ford's innocence, attacking the State's case, and suggesting that Ford had been too intoxicated to have committed the crimes in the manner suggested by the State (II: 96-98; III: 296-98, 331). In addition, a defense memorandum prepared prior to trial and admitted into evidence below establishes that Ford's attorneys explored the viability of several defense theories before settling on the strategy used at trial (II: 91-103). This defense respected Ford's claim of innocence but also laid a foundation for a penalty phase mitigation argument premised on intoxication.

Ford, Sullivan and Alessandroni all acknowledged having discussed the overall defense strategy at length (III: 277, 297, 303, 322-23, 330-33). Ford claimed that he instructed his

attorneys not to use voluntary intoxication as a defense (III: 278-79). Sullivan testified that he did not recall Ford objecting to the strategy, but acknowledged that Ford had denied having been drunk on the day of the murders (III: 297, 300, 303, 325). Alessandroni testified that Ford appeared to agree with the strategy and never instructed them not to use it (III: 332-33, 338-39).

The conflict in testimony as to whether Ford expressly agreed or objected to a defense strategy incorporating a voluntary defense argument is not significant, since counsel are not required, under the Sixth Amendment, to obtain a defendant's consent to trial strategy. In Florida v. Nixon, 543 U.S. 175 (2004), the United States Supreme Court recently reaffirmed an attorney's prerogative to adopt a reasonable defense strategy without the express approval of the defendant:

An attorney undoubtedly has a duty to consult with the client regarding "important decisions," including questions of overarching defense strategy. Strickland, 466 U.S., at 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052. That obligation, however, does not require counsel to obtain the defendant's consent to "every tactical decision." Taylor v. Illinois, 484 U.S. 400, 417-418, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."

Jones v. Barnes, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

Nixon, 543 U.S. at \_\_\_\_, 125 S. Ct. 551 at 560. Ford's assertion that counsel should not have presented a voluntary intoxication defense over his objection does not demonstrate deficient performance; counsel cannot be deemed unreasonable simply because they strategically took some actions against Ford's consent. Damren v. State, 838 So. 2d 512, 518 (Fla. 2003) (strategic decisions do not constitute ineffective assistance where counsel's decision was reasonable under the norms of professional conduct).

Thus, the ruling below was correct as no relief was available under this claim either factually or legally. Whether Ford consented to the particular legal strategy employed by his attorneys has little relevance to establishing constitutionally deficient performance. Under Strickland, Ford must demonstrate that the defense asserted is one that no reasonable attorney would have adopted. He cannot make such a showing on the facts of this case.

Both trial attorneys testified about their reasons for employing the chosen defense: first of all, Ford insisted that

he did not commit the crimes, and maintained that he was not drunk. The State had a very strong case, including compelling DNA evidence, eyewitness testimony placing Ford with the victims at the scene shortly before the murders and appearing dazed and bloody afterwards, and Ford's ties to a .22 caliber rifle, as used on the victims. Sullivan and Alessandroni believed that it was necessary to conduct the guilt phase of the trial with "an eye on" the penalty phase, and considered the intoxication evidence an important foundation (III: 296-97).

Thus, the evidence clearly establishes that Ford's trial attorneys conducted a reasonable pretrial investigation and thereafter adopted a defense which they believed to be most beneficial to their client. The law is also clearly established, that such strategic decisions are "virtually unchallengeable" under the Sixth Amendment. Strickland, 466 U.S. at 691; Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

In Koon v. State, 619 So. 2d 246 (Fla. 1993), this Court considered and rejected a factually similar claim:

Koon has failed to establish that counsel's performance was deficient. According to O'Steen's testimony below, he reviewed the 1982 psychiatric reports and discussed the case with Dr. Wald prior to trial. O'Steen testified that he and Koon discussed the possibility of a voluntary intoxication defense to negate specific intent and thus reduce the crime to second-degree murder. However, Koon insisted on pursuing a verdict of not guilty. Koon maintained that he was innocent and that he was at home asleep at



the time of the murder. O'Steen testified that although his preference would have been to pursue voluntary intoxication as the primary defense, under the circumstances, he felt that the defense of innocence was equally viable. O'Steen testified that his experience had been that juries did not look favorably on the voluntary intoxication defense. Although he considered the possibility that Koon was in an alcoholic blackout at the time of the murder, that was inconsistent with Koon's detailed testimony of where he was and what he did at all times on the day of the murder. Moreover, although O'Steen did not present voluntary intoxication as the primary defense, he presented evidence that Koon was a chronic alcoholic and that he was intoxicated at the time of the murder. The jury was instructed on voluntary intoxication. Based on these facts, O'Steen's decision not to pursue a voluntary intoxication defense was a reasonable trial tactic predicated on his experience, his assessment of the case, and Koon's expressed desires.

As in Koon, Ford's claim of innocence was respected by counsel, yet the evidence of intoxication was argued as a basis to reject a verdict of premeditated murder. The difference in the cases is that, in postconviction, Koon's collateral attorneys thought a more complete intoxication defense should have been presented, but Ford's claim is that his attorneys should not have pursued voluntary intoxication at all. This is a difference without legal significance, as in both cases the postconviction challenge amounted to no more than a disagreement over the chosen strategy employed, and since the trial strategy used was reasonable, the collateral disagreement is insufficient for relief. See Patton v. State, 878 So. 2d 368, 373 (Fla.

2004) (in rejecting claim that voluntary intoxication was not pursued as vigorously as it should have been where defense was presented in limited, narrow manner, Court reiterated that "claims expressing mere disagreement with trial counsel's strategy are insufficient").

This Court has repeatedly stated that "it will not second-guess counsel's strategic decisions concerning whether an intoxication defense will be pursued." Dufour v. State, 905 So. 2d 42, 52 (Fla. 2005); Jones v. State, 855 So. 2d 611, 616 (Fla. 2003). Ford's trial attorneys thoroughly considered their options, weighing the advantages and disadvantages of different defense theories, and chose to use the evidence of Ford's drinking to a limited extent. The reasonableness of their decision precludes a finding of ineffective assistance of counsel, even if Ford did not agree with the strategy.

The defense presented at trial was well within the bounds of reasonableness. Ford has not suggested an alternative theory that he believes counsel should have explored; he has merely asserted that he did not agree with a voluntary intoxication defense as he understood that it would amount to an admission of guilt. Since it was not offered as an admission of guilt and it did not interfere with Ford's claim of innocence, there is no

basis to conclude that his attorneys were deficient in selecting this defense.

Even if there is disagreement as to whether reasonable attorneys would adopt the same strategy, Ford has not offered any basis for a finding of prejudice. As the attorneys acknowledged, the State's case was strong, with eyewitnesses placing Ford at the scene with the victims shortly before the murders; conclusive DNA evidence that placed Ford's semen in Kim Malnory's vagina and on her shirt, Kim's blood in Ford's truck and on his shoe, and Greg's tissue on Ford's knife; eyewitness testimony about Ford appearing bloody and dazed after the murders; finding the rifle stock near where his truck had run out of gas; and other circumstantial evidence linking him to the crime. There is no reasonable probability of a different outcome had Ford's attorneys avoided the issue of intoxication. On these facts, the trial court's rejection of ineffective assistance based on the argument and instruction on voluntary intoxication must be affirmed.

## ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED FORD'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE WAIVER OF SPEEDY TRIAL.

Ford also challenges the trial court's denial of his claim that his attorneys were ineffective for failing to preserve his speedy trial rights. As with the prior issue, the standard of review requires deference to the trial court's factual findings and *de novo* consideration of the legal conclusions. Stephens, 748 So. 2d at 1033. Once again, the testimony presented at the evidentiary hearing compelled the denial of relief, and no error has been demonstrated in this issue.

The trial court specifically found that the decision to waive speedy trial in order to insure adequate trial preparation was not only reasonable, it was "absolutely necessary" on the facts of this case (III: 375). In fact, the court concluded "there is absolutely no way counsel could have been effective had the Defendant's asserted claim of his right to a speedy trial been exercised" (III: 375). The evidence presented below fully supports the trial court's factual finding of necessity. Both trial attorneys testified that they could not have been prepared for trial without securing additional time. Attorney Sullivan testified that there was "no question" in his mind that the initial waiver of speedy trial was necessary (III: 307).

Alessandroni agreed that anytime the defense sought a continuance, it was necessary to prepare the defense; he "can't conceive" trying a case such as this within six months; "[i]t is just not possible" (III: 343).

The direct appeal record also supports the reasonableness of the speedy trial waiver. The murders occurred on April 6, 1997, and Ford was indicted on April 30, 1997 (DA: V1/13-15). The defense needed to depose dozens of witnesses, including many involved with complex scientific issues; independent experts also needed to be consulted (III: 304, 320-21). In addition, numerous sources of mitigation were available for investigation, including mental health issues that had to be explored (III: 304-05, 317, 321). Alessandroni testified at the evidentiary hearing that even more time would have been appreciated, but trial ultimately commenced on February 22, 1999 (III: 343; DA: V26/1009).

Ford does not even allege that the State would not have been able to obtain convictions if a speedy trial had been secured, and Ford's testimony that the State was able to present evidence that would not have been available earlier is much too vague and speculative to demonstrate a reasonable probability of a different result had his attorneys rushed the case to trial. In addition, both Ford and Sullivan confirmed that Ford himself

wanted the DNA testing completed, as Ford believed it would demonstrate his innocence (III: 288, 325). Sullivan testified that a refusal to waive speedy trial would have resulted in the State having the testing expedited, leaving the defense with no way to counter the compelling evidence of guilt (III: 306, 317, 321).

In addition, the fact that Ford at some point began objecting to the pretrial delay does not establish deficient performance. As noted previously, attorneys have a constitutional obligation to prepare and try a case based on their training and experience as to what is in their client's best interest. The right to a speedy trial is not one that is subject to the client's total control. Jones v. Barnes, 463 U.S. 745, 751 (1983); State ex rel. Gutierrez v. Baker, 276 So. 2d 470 (Fla. 1973) (counsel may waive speedy trial without the knowledge and consent of defendant; reasonableness depends on the facts of the case).

Ford's suggestion that attorney Sullivan "seemed to concede that perhaps he should not have waived Appellant's right to a speedy trial" (Appellant's Initial Brief, p. 19), is not persuasive. This conclusion was only offered with the benefit of hindsight, as Sullivan was expressly "looking back on things," in commenting that, despite the extensive pretrial

investigation, the defense had not been able to discover anything particularly helpful for the trial (III: 320-21). Such retrospective considerations are not relevant to a Sixth Amendment analysis, which must determine the reasonableness of disputed actions from counsel's perspective at the time. Strickland, 466 U.S. at 689. The court below specifically found that Sullivan was "unequivocal" that he was not ready for trial at the time of the initial continuance (III: 371), a finding fully supported by Sullivan's testimony (III: 304-06, 317, 321).

The cases cited by Ford do not compel a different result. Burke v. State, 855 So. 2d 207 (Fla. 1st DCA 2003), Brown v. State, 829 So. 2d 975 (Fla. 1st DCA 2002), and Ryland v. State, 880 So. 2d 816 (Fla. 1st DCA 2004), all considered postconviction claims of ineffective assistance of counsel alleging that the trial attorneys did not adequately protect the defendants' speedy trial rights. In each case, the claim had been summarily denied by the trial court, and the cited decisions remanded the issue for an evidentiary hearing. As the court below conducted an evidentiary hearing and made factual findings supported by the testimony, these cases do not demonstrate any error in the denial of Ford's claim.

The fact that Ford's attorneys did not demand speedy trial blindly at his insistence did not render them ineffective as a

matter of law. In fact, Ford's attorneys were constitutionally compelled to conduct a reasonable investigation. There has been no showing, or even a suggestion, that Ford's attorneys were inattentive to their duties or created the necessity of a waiver by failing to take action within reasonable time limits. As no deficient performance or possible prejudice can be discerned on these facts, the trial court's rejection of Ford's ineffective assistance claim must be affirmed.



CONCLUSION

Based on the foregoing arguments and citations of authority, this Court must affirm the trial court's order denying postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail and U.S. Regular Mail to Frederick P. Mercurio, Law Offices of Frederick P. Mercurio, P.A., 747 N. Washington Blvd., Sarasota, Florida, 34236, Fred@mercurioatty.com, this \_\_\_\_\_ day of October, 2005.

CERTIFICATE OF FONT COMPLIANCE

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

Respectfully submitted,

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