IN THE SUPREME COURT OF FLORIDA

DOLAN DARLING A/K/A SEAN SMITH,

Case No. SC04-2379

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The relevant facts were summarized by the Supreme Court of Florida in *Darling v. State*, 808 So. 2d 145 (Fla. 2003):

> The victim in this case, Grazyna Mlynarczyk ("Grace"), was a thirty-three-year-old Polish female living illegally in the United States. The State's first witness, Zdzislaw Raminski (known as "Jesse"), had met the victim in Poland in 1990 or 1991. Grace and Jesse developed a personal relationship, which continued when Grace moved to Orlando on September 28, 1992.
>
> Jesse owned and operated Able Transportation, which provided shuttle service to and from the airport, and Grace was employed part-time with this enterprise. The last time Jesse saw Grace alive was on the morning of October 29, 1996, at around 9:30. At that time she was wearing shorts and a small shirt, as she was doing laundry in a facility at her apartment complex. Jesse did not exit his vehicle when talking with Grace only briefly that morning. She told Jesse that she had an appointment with a gynecologist later that day. Jesse gave Grace an AmSouth Bank envelope containing three hundred dollars cash in payment for work she had performed for the company during the prior week. Jesse drove away from the apartment complex and proceeded to work. Jesse again spoke with Grace around 10:15 a.m. by phone, and she indicated that she was still doing laundry, and would call him after she returned from her doctor's appointment. Although Jesse continued to telephone Grace throughout the day, he was unable to reach her again. Around 4:10 p.m., Jesse called again and was still unable to reach Grace. He became concerned that she had not telephoned him after her doctor's

appointment, so he returned to her apartment complex.

Upon arriving there, he was surprised to find that the blinds to Grace's apartment--which she never closed during the daytime--were closed. He used his key to enter the apartment, where he found a basket with laundry in the living room, and the door to the bedroom closed. He recalled seeing no disturbed objects in the apartment. Upon entering the bedroom, however, he found Grace. She was on her back on the floor, naked from the waist down, with her face near the bed and her legs inside the closet. When she did not respond to him, Jesse moved Grace to the bed, and discovered that she was cold, and had blood on her. He proceeded to call 911 for assistance and members of the fire department arrived shortly thereafter. They soon determined that Grace was dead.

Officers from the Orange County Sheriff's Office responded to the scene and secured items of evidence found in the bathroom, which included a lotion bottle, a pair of panties, and a pink throw pillow. The pillow had a blackened area and a gunshot hole through the sides. There was blood spatter on the door of the closet, and blood present in the closet area. Two AmSouth Bank envelopes were found which contained cash totaling approximately twelve hundred dollars and a shoe box was discovered which contained one thousand dollars. There was also a wallet which held fifty-eight dollars. Jewelry located in boxes appeared to be undisturbed.

An officer who had canvassed Grace's neighborhood to determine whether there were witnesses with information regarding the murder testified that he had contacted Darling on October 30, the day after the murder. Darling's apartment was located just north of Grace's apartment. In response to the investigating officer's inquiry, Darling

had said that "he was working and didn't know anything of the incident."

Dr. William Robert Anderson of the Orlando Medical Examiner's Office testified at trial. His testimony included a discussion concerning the "defect" in the pillow, particularly the "cloud of soot" from the "burning gun powder" left on the pillow as the "bullet comes out." The gun was fired at close range because he observed "in the victim only a small amount of soot material. But ... on the pillow there is a significant amount of that soot material." Dr. Anderson indicated that "the end of the weapon was up against that pillow ... fairly tightly." He also testified that the "defect in the middle is consistent with a bullet passing through ..., creating a tear." When the doctor first saw Grace, "[r]igor mortis was complete," and he estimated that she "was probably dead at least six hours from the time we saw her, which was about seven."

Dr. Anderson testified that the bullet entered "the right back of the head." Grace had an abrasion there "consistent with something having been up against the cloth transferring energy across to the skin and creating that." "That pillow" was consistent with the abrasion. The doctor found that Grace had "some vaginal injuries, but nothing that would make her bleed significantly." There was "[a] lot of bleeding ... inside the brain," but "she's gonna die pretty quick." He stated that "[c]onsciousness would probably not be more than a few seconds," and that "[s]he would have no motor activity" or any "ability to move anything at that point." The doctor stated that "the rapidity [with] which she dies" is "one of the reasons she probably didn't bleed."

The doctor stated that there was "seminal purulent" in Grace's vaginal area and bruising on the "back of the elbows ... consistent with some moving around." There

was "a hemorrhage," which "means that took place when circulation was alive." The vaginal area abrasions were "consistent with vaginal trauma from penetration of some object, penial, digital, some other object." The doctor pointed out that the "tear of the labia majora, which is a very sensitive area" was "quite painful," adding: "This would not be consistent with consensual sex, in that the pain would interrupt the activity. It would be painful enough that consensual sex would not apply after that point." The doctor observed that "there wasn't anything in the labia that would explain those abrasions other than trauma." [FN1] The victim's "rectal area" had "some tears," which were caused by "[d]igital penetration, penial penetration, some trauma." The doctor opined that this, too, was painful. He further indicated that the "gunshot wound to the head with the injuries ... described" was the cause of Grace's death.

> FN1. Dr. Anderson stated that he had "seen many, many sexual assault victims that don't have ... defense wounds...." He observed, further, that in "[t]he majority of the cases of sexual battery ... they don't put up a struggle."

Photographs and records of fingerprints found in Grace's apartment were developed and submitted to a comparison expert. A photograph of fingerprints from the lotion bottle was developed, and admitted into evidence as Exhibit 14. At trial, the State's expert in the detection, enhancement, and recording of fingerprints opined that the fingerprint on the lotion bottle had been there for less than one year. The State's expert in the area of fingerprint comparison compared the fingerprints on Exhibit 14 with fingerprints obtained from Darling. He testified at trial that he found a print on the lotion bottle

which matched that of Darling's right thumb.

Additionally, David Baer, a Senior Crime Laboratory Analyst with FDLE, testified that the DNA in the semen sample from the victim matched the DNA from Darling=s blood sample.

The jury found Darling guilty of capital murder and armed sexual battery.

Darling raised eleven points on direct appeal. He claimed that the trial court reversibly erred in:

(1) denying Darling's motion for judgment of acquittal;

(2) admitting DNA evidence;

(3) not allowing defense counsel to comment on the State's failure to exclude other suspects;

(4) limiting Darling's voir dire examination during jury selection;

(5) denying Darling's requested instruction regarding circumstantial evidence;

(6) precluding defense counsel's rebuttal closing argument where the State had waived its closing argument;

(7) refusing to allow Darling to argue residual doubt as a mitigator; and

(8) denying Darling's requested special penalty phase jury instructions.

Additionally, Darling asserted that:

(9) the absence of a complete record on appeal deprived him of adequate appellate review;

(10) his death sentence is disproportionate;

and

(11) his death sentence violates the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Dec. 24, 1969) (the "Vienna Convention").

Darling v. State, 808 So. 2d 145 (Fla. 2003).

This Court affirmed the convictions and sentences. Darling filed a petition for writ of certiorari in the United States Supreme Court which was denied October 7, 2002. *Darling v. Florida*, 537 U.S. 848 (2002). Darling filed a Motion for PostConviction Relief on September 22, 2003, raising thirty-eight (38) claims:

(1) State agencies withheld public records;

(2) Counsel was ineffective for allowing Juror Wilson to serve on the jury;

(3) Counsel was ineffective for failing to object to a fingerprint on a lotion bottle;

(4) Counsel was ineffective in the penalty phase for failing to ensure adequate mental health exam and present mental health mitigation;

(5) The jury was misled by comments and instructions which diluted their sense of responsibility;

(6) Jury instructions limited mitigation; counsel was ineffective;

(7) The prosecutor made improper closing remarks; counsel was ineffective;

(8) The jury was told a death recommendation was required; counsel was ineffective;

(9) Counsel failed to obtain an adequate mental health evaluation in violation of *Ake v. Oklahoma;*

(10) Cumulative effects of ineffective assistance of counsel and erroneous trial court rulings;

(11) Newly discovered evidence;

(12) The State withheld material evidence;

(13) Counsel was ineffective in voir dire;

(14) Improper prosecutor arguments; counsel was ineffective;

(15) Counsel was ineffective for failing to investigate and present mitigating evidence;

(16) Darling is innocent of the death penalty;

(17) Darling was absent during critical stages of the trial;

(18) Penalty phase instructions shifted the burden; counsel was ineffective;

(19) Jury instruction on expert testimony was erroneous; counsel was ineffective;

(20) Jury instructions on aggravating circumstances erroneous; counsel was ineffective;

(21) The State introduced nonstatutory aggravating factors; counsel was ineffective;

(22) Jury was misled by comments and instructions that diluted its sense of responsibility; counsel was ineffective;

(23) Darling could not interview jurors; counsel was ineffective;

(24) The prosecutor overbroadly and vaguely argued aggravating circumstances; counsel was ineffective;

(25) Electrocution is cruel and unusual;

(26) Florida's death penalty is arbitrary and capricious;

(27) Darling was prejudiced by pre-trial publicity; counsel was ineffective;

(28) The trial court erred in finding mitigating circumstances;

(29) The sentencing order does not reflect an independent weighing;

(30) The record on direct appeal was incomplete;

(31) Excessive security measures or shackling; counsel was ineffective;

(32) The judge and jury relied on misinformation; counsel was ineffective;

(33) Jury instruction on majority vote of jury was erroneous; counsel was ineffective;

(34) Darling's death sentence is predicated on an automatic aggravating circumstance; counsel was ineffective;

(35) *Ring v. Arizona;*

(36) Counsel was ineffective for failing to request an instruction and present evidence of parole ineligibility;

(37) Counsel was ineffective for failing to hire experts and challenge scientific findings of FDLE regarding DNA;

(38) Darling's trial was fraught with error.

(PCR[1]1256-1341). The State filed a response to Darling's motion and moved to strike the claims which were not sufficiently pled. (PCR1371-1474). The State attached portions of the record on appeal which refuted Darling's claims.

The trial court held a hearing on January 8, 2004, and entered an Order Granting State's Motion to Strike and Summarily Denying Claims. (PCR1563-1564). After the Case Management Conference the trial court entered an Order of Summary Denial of Certain Claims and Order for Evidentiary Hearing on Certain Claims. (PCR1534-44). The trial court set an evidentiary hearing on Claims I, II (only the ineffective assistance claim), III, IV/XV (the two claims encompassed one issue), and X/XXXVIII (the two claims encompassed one issue). Claims II (in part) V, VI, VII, VIII, IX and XXXV were summarily denied. Claims V, VIII, and IX were found to be procedurally barred. Claims XI through XXXIV and XXXVI were stricken. (PCR1534-1544).

EVIDENTIARY HEARING

The evidentiary hearing was held before the Honorable John

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1 Cites to the record are consistent with those in the Initial Brief, i.e., "R" for the record on direct appeal, "TT" for the transcripts of the guilt phase, and "PCR" for the present, post-

H. Adams on April 26-29, May 3 and May 7, 2004. Darling presented the testimony of his father, Carlton Darling; his cousin, Mario Smith; a social worker, Marjorie Hammock; a forensic psychologist, Dr. Mark Cunningham; a neuropsychologist, Dr. Henry Dee; and a quality assurance consultant, Janine Arvizu. The deposition of Mervin Smith, Darling=s fingerprint expert, was admitted over the State=s objection. The depositions of Lance McIntosh and Montico Rahmings were admitted by stipulation. Darling also proffered the testimony of Chris Smith, attorney for Darling in a prior felony case. The State presented the testimony of Dr. David Frank, psychiatrist, David Baer, DNA analyst with FDLE-Orlando; Francis Iennaco and Robert LeBlanc, Darling=s trial attorneys; and Tony Moss, fingerprint examiner with the Orange County Sheriff=s Office.

After these witnesses testified, the court recessed and returned on May 3 for the testimony of Darling=s fingerprint examiner. (PCR76-85). Since the examiner needed enlarged photographs, the hearing was recessed until May 7. At that time Darling announced Mr. Smith would not be testifying. (PCR112).

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conviction, record on appeal.

EVIDENTIARY HEARING TESTIMONY

Carlton Darling, Appellant's father, gave a telephone deposition in 1998, but did not speak to his son's defense attorneys. (PCR137, 139-40). He never married Darling's mother (Eleanor Smith) as he never saw himself "being obligated to no one particular female." (PCR142). They had two children together, Veronique, and Dolan. (PCR141).

Eleanor would take Dolan and Veronique, to school and Carlton would pick them up at the end of the day. (PCR141, 142, 143). The ride home from school was the only time he spent with his son. If Dolan was not at the expected location, Carlton would "slap him upside the head once or twice." (PCR145). If Carlton had been drinking excessively on a particular day, and Dolan was not in the expected location, "I give him a good one when I reach home. But normally it would just be a punch in the car ... he get hit with my fist." (PCR146). At home, he would hit Dolan with a one-inch piece of PVC, typically in the head. (PCR146). If Dolan did not give Carlton his phone messages, he would beat him. (PCR149). Dolan saw his parents have physical fights. (PCR149). Dolan and Carlton did not have a relationship. Carlton said, "My son was no friend of mine. We no buddies. It's just do as you told. I take care of you and that's it." (PCR154). Although they did not get along, Carlton would have

been willing to testify in his defense. After he moved out of the family home, Carlton told Dolan, “You-all don’t bother with me and I don’t bother with you-all, and that was it.” (PCR155).

Carlton did not beat Veronique because she never gave him any trouble and did as she was told. (PCR164). Carlton recalled an incident when Dolan was eight years old and was beaten with a bat by other children in the neighborhood.[2] (PCR158-59). Carlton remembered one time that Dolan started to stutter "right after a beating." (PCR162). He beat his son about six times a week. (PCR163).

Carlton worked his way up from being a clerk at the Paradise Island Hotel (presently the Wyndham Crystal Palace) in Nassau, Bahamas, to the manager position. (PCR138). He provided a good living for his family who lived in a three-bedroom home that he and Eleanor built. (PCR168-69, 170). Dolan was never a “troubled child ... I had problems with him disobeying my orders.” (PCR172). It was common practice in the Bahamas to discipline children. (PCR173). The school Dolan attended would discipline the students with beatings. If a student was sent to the Principal's office, he would "get hit as hard as the Principal could ... for disobeying ... rules and regulations." (PCR151-52). Carlton never beat his son until he was unconscious, nor

[2]Subsequent to this beating and the beatings received by his father, Dolan would bleed from his nose and stutter. (PCR176).

did he have to take him to the hospital. (PCR181). Dolan did not abuse drugs or alcohol and was not a violent child. (PCR174, 175). However, on one occasion, Dolan threw a brick through his father's car window after receiving a severe beating. (PCR175-76).

It was quite common in the Bahamas for men to have multiple women in their lives. (PCR179). He and Eleanor started having problems after she found out about the other women. (PCR180). He explained, "My life more or less was just open, and I would do whatever." (PCR187). Eventually, problems progressed between Carlton and Eleanor. He "pushed her out of my room ... She stayed in Dolan's room ... use the bed and Dolan used the floor." (PCR196). He said, "My own common sense will tell me that's a mother's love to son, son's love to mother. In my mind, the way I would think, would never wander anywhere else." (PCR202).

Mario Smith, Darling's cousin, is a former prison officer now working in construction. (PCR203). He worked three years at Fox Hill prison in the Bahamas. Darling, at nineteen years old, was incarcerated there. (PCR204, 219). The conditions were deplorable; the prison was infested with roaches, lice and rats. (PCR204-05, 208). The method of execution at that prison was by hanging, and "practice runs" were frequently conducted. (PCR208,

209). There was a mixture of mentally ill patients with others in the same cell block. (PCR211). There were no lights or running water in the cells. (PCR212). There was a system in place for inmates to make a request or complaint but many went unanswered or unresolved. There were two part-time doctors on staff, available for three to fours hours per day. (PCR213, 214). Inmates were beaten with "water hoses" on a regular basis. (PCR215). Sexual assaults occurred. (PCR217).

Darling was familiar with some of the other inmates, "people that looked out for him." He never complained that he had been beaten. (PCR219). He did not fight, or exhibit any type of behavior that was not normal for someone who was incarcerated. (PCR220, 221). Darling was not a participant in the mock hangings that took place. (PCR222). Inmates were permitted to have as much water as they wanted, and received toiletries from family or friends. (PCR223). Darling's mother and sister visited him while he was at Fox Hill prison and provided him with what he needed. (PCR225-26). There were times that Mario did not see Darling as he was working in another wing.(PCR226). Five to six inmates were housed per cell. Fans were located in each corridor to ventilate the air. (PCR229).

Marjorie Hammock teaches clinical social work courses at Benedict College in South Carolina. (PCR230-31). She conducts

"biopsychosocial histories and assessments." (PCR232). She interviews defendants, reads various reports, examines school and employment histories, reviews alcohol and drug profiles, and determines family composition in conducting her assessments. (PCR236). She interviewed Darling's mother, father, and older brother. She reviewed Darling's medical and school records and relied on the examinations conducted by Drs. Cunningham and Dee. She spoke with some of Darling's friends and visited Fox Hill Prison. (PCR237-38).

Darling's mother told Hammock her pregnancy with him was "uneventful." Upon birth, he was extremely jaundiced, and tended to be nauseous more than her other children. (PCR242). There were no significant differences in his development. He had trouble focusing in school and suffered injuries to his head "from blows ... falls ... beatings ... " Frequent nosebleeds began early in his life. His parents did not seek medical help for this condition. (PCR242-43). There was a history of physical abuse from his father; emotional abuse from both parents, a lack of connection. (PCR243). He was not a good student, but put forth a great effort. (PCR244). Darling's learning difficulties may have been related to his physical and emotional conditions. (PCR250). When he was placed in an "industrial school,"[3] He

3 The school was "a holding environment for folks who had either committed some crimes as juveniles and/or whose parents

experienced a series of head injuries which were “significant” at the time because he lost consciousness. (PCR253-54). Darling was involved in a of gang. (PCR259). He began experimenting with alcohol at age 11 or 12 and with marijuana a year later. (PCR261). Darling ultimately abused both alcohol and drugs, but mostly drugs. Marijuana was his drug of choice. He used crack cocaine on an every-other-day basis. He sampled different types of drugs in pill form.[4] (PCR261). Darling's reports of physical abuse by his father, as well as that reported by his father, went "above and beyond the actual physical harm." He could do nothing right." (PCR263). Darling saw his father physically abuse his mother. (PCR264-65).

Darling had some mental health issues and learning disabilities that should have been addressed. He lived in a corrupt and abusive environment, and had a violent childhood. He had no emotional support during his early years. (PCR285). His head injuries could have had an impact on his development. (PCR286). Darling's time in a boys' home as well as his prison experience in Fox Hill prison, "could have produced a very poor sense of self, ongoing depression, sense of worthlessness."

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deemed them to be out of control and needing to be under the care of a facility like that.” (PCR256).

[4]Darling self-reported using rohyphnol, quaaludes, LSD, and mushrooms.(PCR262-63).

(PCR287). Darling's mother told Hammock she bought the property where their house was in order for the family to be in a safer neighborhood. (PCR291). Darling attended one of the best private schools in Nassau. (PCR293). Ms. Hammock reviewed Darling's test results from the Wechsler Intelligence Test, and agreed that Darling scored in the low/average range.[5] (PCR299).

Darling escaped from the Bahamian prison and came to the United States. (PCR308, 310). Arriving without any resources, he was able to establish himself, find a job and a place to live. (PCR310-11). Darling robbed a taxi driver and attempted to shoot him. He claimed the shooting was an accident. (PCR314, 341).

In reviewing the trial expert's testimony, (Dr. Herkov) Hammock agreed it was significant that he told the jury that Darling suffered "extreme physical abuse" as a young child. (PCR323-24). Further, Dr. Herkov told the jury that there were extramarital affairs and Darling got in the middle of fights between Carlton and his mother. (PCR324). The jury was also aware Carlton was an alcoholic and admitted abusing Dolan with a PVC pipe. (PCR325-26). Due to being abused, Darling became "desensitized to violence." (PCR326-27). Through Dr. Herkov's testimony, the jury was aware that Darling had learning

[5]Darling scored an average score of 90. (PCR299). In addition, at age nine, he scored in the average or above average range in all achievement areas. (PCR300).

disabilities, did not do well in school, and had been sexually abused. (PCR328-29). Dr. Herkov did not mention drug or alcohol abuse. (PCR348).

Dr. Mark Cunningham, a clinical and forensic psychologist, interviewed Darling and his family members. He reviewed interview summaries, various trial records and testimony, testing summaries, school records, depositions and DOC records. (PCR361, 380-81, 383).

Dr. Cunningham found that Darling suffers from "faulty wiring," problems in neurological or cognitive functioning. (PCR384, 386). He also suffers from "parental poisoning," "sexual poisoning," and "community poisoning." (PCR384, 385). Dolan self-reported that he had difficulty in reading and learning, and attended special tutoring classes. His mother advised Dr. Cunningham that he "was not up to par with other students." (PCR386, 389).

Darling had many head injures as a child, and, at times, was rendered unconscious. (PCR396-98). He was subjected to extensive traumatic experiences of both an emotional and physical nature. "That psychological trauma ends up affecting the metabolism and the architecture of the brain." (PCR403).

In relying on Dr. Dee's testing, Dr. Cunningham said Darling suffers from "significant dysfunction ... in frontal lobe

functioning."[6] (PCR407). Darling has problems with verbal information and "remote verbal learning." (PCR407). Darling's history indicates that he is reactive and aggressive. After being rendered unconscious after an attack with a baseball bat, he was more irritable, and reactive and explosive. (PCR411). There is a significant history of alcohol dependence in Darling's family. (PCR413). Darling is genetically predisposed to alcoholism from both sides of his family. (PCR414). However, these mitigating factors did not diminish his criminal responsibility. (PCR421-22).

Darling's onset of alcohol and drug abuse began at age nine. (PCR422). At age sixteen, he started abusing marijuana and the alcohol abuse subsided. (PCR423). Eventually, he started to abuse cocaine, quaaludes, roofies, rohypnol, hallucinogenic mushrooms, and LSD. Darling self-reported that he started getting paranoid, fidgety, and more reactive. (PCR424). He was using drugs during the time period of the offenses in this case. In Dr. Cunningham's experience, defendants do not exaggerate their drug histories. (PCR425). In addition, due to Darling's age the time of the crime, 20, his brain was not fully mature. Nervous system development and brain development continue until

6 The frontal lobes are the command and control center, the part of the brain responsible for judgment, impulse control, appreciation of consequences and empathy. (PCR408).

age 25. (PCR432).

Darling's parents' interaction with him was "toxic." His parents' actions were psychologically destructive and put Darling at increased risk for bad outcomes. (PCR440). Darling's father drank on a daily basis while Darling was growing up. He was a womanizer and was physically violent. (PCR446-47). The dysfunction in Darling's family went back generations and involved substance abuse, alcoholism, parental irresponsibility, parental abandonment, disrupted parent/child relationships, promiscuity, exploitation of females, violence toward women. (PCR447).

Due to the sexual poisoning that occurred in Darling's family, he was unable to develop "a healthy sexuality and a way of relating to woman in a constructive, caring sort of way."[7] (PCR484). Dr. Cunningham explained that the offense in this case may have been motivated by "the malignantly evil heart and fully-conscious volitional choice of the defendant." (PCR485). On the other hand, the criminal behavior may have been the result of "the outgrowth of damage (suffered by Darling) as opposed to simply a willfully, evil choice made from a level playing field." (PCR485).

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7 During his early adolescent years, Darling was in the cabaret (where he father worked) around women who were dressed very scantily, "in G strings and topless shows." (PCR503).

Darling was in a gang called the Rebellion Boys. Gang activity was very frequent in the Bahamas. (PCR512). The conditions at the Boys Industrial School where Darling was sent, were "brutal and traumatizing." (PCR519). As punishment, inmates were put in rooms with rival individuals or the mentally ill. (PCR523-24). Eventually, Carlton Darling discontinued financial support and Dolan "was simply out on the streets." (PCR476). Although Darling's mother was unaffectionate, she would tell Darling that she loved him when he got in trouble. (PCR478). In Dr. Cunningham's opinion, Dr. Herkov did not spend enough time in reviewing records and interviewing Darling, in order to "explore all possible biopsychosocial adverse development events that might have affected [Darling's] developmental trajectory or have some nexus with the offense." (PCR532-33). Dr. Cunningham did not perform any tests on Darling; he relied on the neuropsychological testing that was conducted by Dr. Dee. (PCR540).

Dr. Henry Dee, clinical psychologist and neuropsychologist, conducted a neuropsychological evaluation of Darling in October 2003. (PCR593, 598). Dr. Dee obtained a social history and past medical history[8] from Darling and conducted testing[9] for most of

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8 Darling reported he had suffered a head injury at age eight. He fell off his bicycle and was rendered unconscious. (PCR608).

the day. (PCR598). He reviewed school and crime records from the Bahamas as well as DOC records. (PCR600). He reviewed the trial testimony of Dr. Herkov. (PCR601).

Darling told Dr. Dee that his parents separated when he was nine years old. He would see his father approximately every two months, "passing on the street, and so forth." (PCR604). Darling reported that his father was an alcoholic and abusive. (PCR605). After fighting at school, Darling was sent to a Boys Industrial School similar to Boot Camp.[10] Darling was sexually abused by the Headmaster. (PCR605). He did not report the abuse because the Headmaster was "kind to him, took him to the beach, gave him extra food, took him home on holidays ... " Darling believed the Headmaster acted in a "fatherly" way. (PCR606-07). Darling's mother was passive and his relationship with her was distant. (PCR605). Darling believes he is slow in reading and math, but only slightly below average. (PCR606).

After leaving the Industrial school, Darling worked in construction but did not maintain steady employment. (PCR607). He would steal food and shoplift. (PCR608). Darling started to

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9 Dr. Dee administered *inter alia,* the Wechsler Adult Intelligence Test, the Denman Neuropsychology, Neuroscale, the Wisconsin Card Sorting Task, Categories Test, Judgment of Line Orientation, and Test Facial Recognition to Darling. (PCR618).

10 Darling suffered a head injury at the Industrial school. He was hit in the head with a shovel and rendered unconscious. He subsequently suffers from headaches in the right frontal area.

stutter or stammer at age nine; he never received speech therapy. (PCR610). Darling reported that he started abusing alcohol during his childhood and early adolescence. Throughout late adolescence and young adulthood, he abused drugs. (PCR611-12). It was Dr. Dee's opinion that Darling did not abuse drugs or alcohol to the point where there would be any measurable decline in performance on testing or cerebral adequacy. (PCR613). Darling's difficulty in math and writing during his early school years might have been the first clue there was something wrong with brain function. (PCR615). Darling did not have consistent medical care, and was not nurtured as a child. (PCR615).

The result of the Weschler test indicated Darling has a full scale IQ of 89, in the low average or dull normal range. There was no significant difference between the verbal and non-verbal abilities. (PCR621). The Denman test result indicated a full memory quotient of 93, consistent with the Weschler test result, but with a discrepancy between the verbal and non-verbal of 76 and 117, respectively. (PCR626-30). Darling's memory is comparable to his general mental function. (PCR632). Darling failed the Wisconsin Card Sorting Test and Categories Test, tests which are designed to identify frontal lobe damage. (PCR627, 628, 633, 634). These tests indicate there is an

impairment in frontal lobe functioning, "frontal lobe syndrome."[11] (PCR635, 639).

Dr. Dee never reviewed Dr. Herkov's report. (PCR642). Dr. Dee believed the abuse and neglect that Darling experienced in his childhood had nothing to do with the conclusions about his neuropsychological testing. (PCR643). Dr. Dee stated that frontal lobe damage creates a substantial impairment in the ability to conform one's conduct to the requirements of the law. (PCR681-82). Dr. Dee opined that frontal lobe damage should constitute a statutory mitigating factor. ((PCR682).

Janine Arvizu, a quality assurance consultant with Consolidated Technical Services, Inc., performs quality assurance audits and data quality assessments of laboratories. (PCR703-04). In reviewing the controls used in this case regarding DNA testing, Arvizu noted that only positive controls were used, not negative controls, which is "absolutely" required. (PCR722). She said the FDLE laboratory did not have a quality assurance program in place when the testing was performed. (PCR726). Ms. Arvizu admitted she was not a DNA expert and only had "lay knowledge" of DNA techniques. Her assessment was limited to whether good lab practices were followed. (PCR778, 1173). Ms. Arvizu also conceded she was not

11 Dr. Dee admitted this diagnosis is not based on the Diagnostic Statistical Manual. (PCR639).

qualified to question the DNA results. (PCR1173).

After lunch the third day of the evidentiary hearing, the State provided collateral counsel with seventy pages of documents: the standard operating procedures for the FDLE lab regarding DNA-RFLP testing, and procedures for detection of RFLP and DNA. (PCR946). Collateral counsel had filed public records requests pursuant to Chapter 119 for these documents. (PCR947). After a hearing during which Jim Martin from FDLE appeared, collateral counsel was provided the 2001 quality manual. (PCR947). However, this manual was not the one in effect at the time of the murder. (PCR947). Therefore, counsel requested permission to re-open their case in chief in order to allow Ms. Arvizu to review the documents and revise her testimony based on the new documents. (PCR949). The State advised the court that when Ms. Arvizu testified the previous day she had not received the appropriate documents. David Baer from FDLE went back to the lab, found the documents on his laptop and printed them out for her. (PCR949-950). Collateral counsel said Ms. Arvizu would need a matter of weeks to review the documents. (PCR951). The trial judge suggested recessing to allow Ms. Arvizu to review the new documents. (PCR951). Ms. Arvizu said she could not complete her review even if she worked all night. (PCR952). The court recessed at 2:15 p.m. and told Ms. Arvizu that she could

go to FDLE and ask questions of the analysts so that she did not have to reconstruct the entire process. (PCR954). Court would resume at noon the next day. (PCR954). The trial judge then called FDLE to make sure Ms. Arvizu would be able to conduct an investigation at the facility. (PCR955). Defense counsel accompanied Ms. Arvizu (PCR956). The clerk made copies of Ms. Arvizu's documents that had already been introduced into evidence. (PCR956-57).

Ms Arvizu returned to the stand the next afternoon to supplement her testimony after reviewing the FDLE documents. (PCR1142). She was at the FDLE lab from 3:00 to 6:00 p.m. the previous day and again that morning until 11:30 a.m. (PCR1142-43). After receiving the manuals from FDLE at noon the day before, she made a list of additional documents she wanted to see. The lab was able to provide about two-thirds of the records on cases. (PCR1114). Arvizu received the parts of the quality manual referring to DNA, but not the general procedures. (PCR1145). She did receive the complete "RFLP SOP" manual. (PCR1145). Arvizu was unable to determine the shelf life of the reagent used in 1997. (PCR1146). FDLE was not able to provide the quality control data of the suppliers of the DNA standards used in this case (PR1148). She did receive the record of testing for the restriction enzyme and the manufacturer lot

records. (PCR1149). She received the gel test results, including autorads used for the analytical gels in this case. (PCR1149). FDLE was not able to produce the annual check of the calibrated thermometer. Arvizu testified that David Baer was very helpful in obtaining all the records she requested, and admitted that it is very difficult to produce the detailed records from a case eight years prior. (PCR1150).

Arvizu requested records of the pipettor calibrations. (PCR1150), sequence of the probes in this case, and record of membrane stripping, and received them all. (PCR1151). Arvizu also received the match window criteria document. (PCR1155). The most serious unavailability of records was the electronic records, i.e., the scanning of the autorads. (PCR1151). The lab did not keep the digital images. (PCR1152). An independent party would be unable to reconstruct and assess the validity of the call in the absence of the electronic data. (PCR1155).

Arvizu's audit of FDLE was not complete. (PCR1157). The trial judge then told Arvizu that:

> [t]he purpose for which this testimony is being offered is to lay the foundation for an argument that the attorneys did not provide effective assistance of counsel. So the question for this witness is not the conduct of a complete site review of the Florida Department of Law Enforcement, it's whether or not she has sufficient evidence to answer questions that would lay the foundation for that argument.

(PCR1162). With that in mind, the judge asked Arvizu whether she was able to provide that information. (PCR1162). Arvizu responded that she had not looked at everything and "some of it just simply doesn't exist." (PCR1163). What should have been raised at trial was that:

> [t]he laboratory documentation with respect to sample integrity was not of appropriate pedigree. That is, there were inconsistencies and mislabelings associated with very crucial samples, and that lends a degree of uncertainty to the work purported out by the laboratory. They simply did not have a robust, effective assistance for ensuring that unbroken link between evidence seized and results reported.

(PCR1163). Arvizu found nothing to suggest the DNA belonged to anyone other than Darling. (PCR1164). What Arvizu was doing was going through the procedures manual to determine whether FDLE complied with their own policies and procedures. (PCR1165). In her opinion, FDLE failed to comply with their own procedures and protocols. (PCR1165). The DNA testing method used was scientifically accepted in 1997. (PCR1173). What Arvizu questioned was whether the interpretation of the results was valid. (PCR1173). The trial court then observed:

> THE COURT: As I understand your expertise, what you're saying is that you're not able to testify whether it was or not because you're not a DNA expert?
>
> THE WITNESS: That's correct.
>
> THE COURT: But you are the expert on the

documentation.

THE WITNESS: The quality control practices.

THE COURT: Quality control practices of the documentation. So what you are testifying to is as to the quality control and documentation that you are saying is not sufficient for you to be able to reconstruct the scientific test results?

THE WITNESS: That's exactly correct.

THE COURT: Which you are not qualified to question?

THE WITNESS: That's correct.

(PCR1173).

Arvizu engaged in training and speaking engagements on how to discredit crime labs. She recently presented a talk entitled "Warrior for the Defense. New Strategies" with a sub-title "Crime Labs. Can you Trust Them?" to the National Association of Criminal Defense Lawyers ("NACDL"). (PCR1176). She wrote an article for the NACDL titled "Shattering the Myth. Forensic Laboratories" in 2000(PCR1177). That was the first article she had written for defense attorneys. (PCR1178). Arvizu did not know of anyone attacking the forensic side of DNA analysis through quality assurance prior to 2000; however, she was available in 1996 or 1997 to review lab records.(PCR1179, 1201). Arvizu's first forensics reports were in the 1999 time frame. (PCR1179). The first time she testified in Florida was in March

2001 after the article for the NACDL. (PCR1181). Arvizu charges $150/hour and had worked approximately forty-four hours invested in the case. (PCR1195).

David Baer, FDLE DNA lab analyst, testified about Darling's DNA results in the 1998 trial. (PCR1207). He had been with FDLE since 1979. (PCR1216). Baer's proficiency is tested twice a year. He has always performed satisfactorily. (PCR1207). Audits of the FDLE lab are regularly performed by the American Society of Crime Laboratory Directors (ASCLD), the DNA Advisory Board, and SWGDAM. (PCR1208). There is an internal audit every year and an external every two years. Every five years there is an ASCLD audit in order for the lab to retain accreditation. (PCR1209). An external audit was conducted by Metro-Dade Crime Lab on January 23, 1997. This was the audit closest in time to Darling's DNA lab testing. (PCR1209). The one recommendation was to have calibration logs for temperatures and a more clearly defined quality assurance person within the lab. Baer was the person who performed most of the quality assurance duties. (PCR1210). Arvizu was the first quality assurance expert hired by the defense that had come into the lab to collect records. (PCR1217). Baer did not recall quality assurance ever being raised as a trial issue before this case. (PCR1218).

Baer had no doubt the DNA from the sperm fraction in the

sample he tested matched Darling's DNA. (PCR1218). Baer entered Darling's DNA into CODIS, and it matched two other samples from Darling: one from Ft. Lauderdale and the other was the sample DOC obtained from Darling when he was convicted. (PCR1220).

FDLE is accredited by ASCLD Accreditation Board which reviews all procedures and documentation in the lab, conducts a case file review, inspects the labs, interviews analysts, and decides whether the lab meets their guidelines. FDLE received accreditation in 1990, and again in 1995. (PCR1211). The internal audit closest in time to Darling's DNA analysis was November 21, 1996. (PCR1212).

There is no way to save the electronic files which Arvizu complained about. (PCR1213). They save the original film and printouts. Arvizu had the printouts which were introduced at trial. (PCR1214).

The trial court allowed Arvizu to file a supplemental report after she reviewed all the documents from FDLE. (PCR84,118, 1580-85). On May 7, 2004, collateral counsel presented another list of documents Arvizu wanted to review. (PCR113). Collateral counsel acknowledged that Arvizu is not a DNA expert and could not render an opinion as to whether a given unknown sample matched or did not match a known sample. (PCR114). She was, however, qualified to speak to lab procedures. (PCR115).

Dr. David Frank, a psychiatrist, evaluates and treats mentally ill inmates for the Department of Corrections. (PCR797-98). He reviewed a vast amount of background material on Darling and conducted a psychiatric evaluation on March 31, 2004. (PCR799-801).

Dr. Frank determined that Darling was competent and sane at the time of trial. Moreover, he demonstrated good knowledge of the legal system. (PCR805). Dr. Frank saw neither an extreme emotional disturbance in Darling nor a situation where Darling could not appreciate the criminality of his conduct. (PCR806, 807). Darling did have a history of substance abuse, below average intelligence, and a personality disorder, i.e., anti-social personality disorder. (PCR806, 815). Darling showed the signs of conduct disorder, a precursor to anti-social personality disorder, before the age of fifteen. (PCR 815). Darling bullied people, would threaten or intimidate, initiated fights, used weapons, stole a purse at age fourteen while confronting the victim, committed vandalism in the fifth grade, lied to obtain goods, and stayed out at night. (PCR 815-16). He stole his mother’s car one time and crashed it. (PCR 817). Darling’s juvenile record also supported conduct disorder. (PCR817). Darling had repeated arrests and criminal acts in the Bahamas. (PCR818). The records in Exhibit #2 showed Darling

denied physical or sexual abuse. (PCR820).

Dr. Frank reviewed Dr. Dee's report and observed that the latter never gave a diagnosis. (PCR831). Dr. Dee referred to impulsivity, which is part of the anti-social diagnosis. (PCR832). Aggressiveness is also part of anti-social. (PCR833). Dr. Dee's facts fit a diagnosis of anti-social personality. (PCR833, 836). Dr. Dee referred to head injuries; however, head injuries do not cause frontal lobe impairment: brain damage does. (PCR832, 875). Headaches are not a sign of brain damage because the brain has no pain nerves. (PCR875). Dr. Frank did not find a marked change as Dr. Dee found. Dr. Frank said Darling's anti-social behavior showed a gradual process. (PCR834). It was certain that if someone repeatedly hit a person, that person would become irritable. (PCR834). Dr. Frank did not notice Darling stuttering. To the contrary, he noted that "he speaks quite well." (PCR835). People stutter because they are scared. Stuttering after someone beats you would be expected. (PCR835). Darling exhibited better speech than Dr. Frank would expect from a person with an IQ of 84-90[12]. (PCR835).

Dr. Frank did not find anything to support Dr. Dee's position that Darling was doing fine one day and suddenly started getting into trouble. Darling was punished by his

12 The intelligence tests given by Dr. Herkov and Dr. Dee were relatively consistent. (PCR869).

father for various misbehaviors which were continuous. (PCR835-36). There was no marked event which changed Darling's behavior. (PCR836). Darling was able to plan ahead. (PCR836). Dr. Dee said Darling was "disinhibited;" however, his crimes were calculated and had limitations. (PCR837). Using a pillow to muffle the fatal gunshot to his victim showed planning. (PCR837). Having a gun in the first place showed the rape and murder was not an impulsive act. (PCR868).

Dr. Frank disagreed with Dr. Dee's assessment of Darling's performance on the Wisconsin Card Sort. (PCR838). Dr. Frank associated poor performance on the test with "increased risk of actually getting caught, not with low violence." (PCR838). Dr. Frank's analysis was supported by a paper by the American Psychiatric Association, the same organization that publishes the DSM-IV-TR. (PCR839). The Wisconsin Card Sort does not conclusively show brain damage. It shows someone's ability in sorting cards. (PCR864). None of Dr. Dee's testing showed "disinhibition." (PCR840). Dr. Frank also dispelled the myth of Phineas Gage. (PCR841-42). Gage's frontal lobes were damaged in an accident, but there never was violence or criminal behavior as a result. (PCR843-45). Darling is able to control his behavior very well, as exemplified by his jail behavior. When he is subject to getting caught, he can control his behavior.

(PCR845). He was never violent with his mother or girlfriend. McIntosh described Darling as a dependable person, i.e., able to plan. He was always controlled around his friends. (PCR846). There was no evidence of explosive behavior toward his friends or family. (PCR849). Darling can inhibit his behavior. (PCR850).

Dr. Frank found no new mitigating circumstances, even considering Dr. Cunningham's "poisoning" list. (PCR847). Dr. Frank did not consider Darling's school performance as a learning disorder. Performance was consistent with IQ. (PCR848). Dr. Frank did not see evidence of brain damage, although there were several head injuries. (PCR848). Most of the head injuries were attributable to Darling's reckless disregard for himself and others. (PCR848). The "neuropsychological deficits" were better explained by a diagnosis of anti-social personality disorder.(PCR849). Being physically abused increases the chance of a person progressing from conduct disorder to anti-social disorder. (PCR866).

Dr. Frank found no signs of alcohol dependence in Carlton Darling's background. It was alcohol abuse. (PCR851). Other factors listed by Dr. Cunningham were either cumulative or not mitigating (teen onset poly-drug dependence). (PCR852-856). Dr. Cunningham "exploded" a few aspects of Darling's life which were "repeated over and over again in a different way." (PCR871). The

fact that Darling's mother slept in the same room with him was more cultural than a lack of boundaries. (PCR856). Dr. Frank considered it a positive thing because the mother's vigilance during Darling's early teens could have prevented or delayed anti-social behavior. (PCR857). Whether there was sanctioned police brutality in the Bahamas may or may not have been mitigating. Sometimes persons with personality disorders perceive events in prison differently. (PCR858). Darling never reported being brutalized. (PCR859).

Dr. Frank reviewed Dr. Herkov's MMPI test results. To Dr. Frank they seemed invalid, but Dr. Herkov is the expert on MMPI testing, so his interpretation would be controlling. (PCR860-61). A very experienced psychologist like Dr. Herkov would be able to adjust test scores to compensate for exaggeration. (PCR862). Dr. Herkov's WAIS-R results were consistent with Dr. Dee's. (PCR863). All the MMPI tests had an elevated "F" scale showing that Darling was faking to appear bad. (PCR963). "Faking bad" is consistent with antisocial personality. (PCR876).

Dr. Frank reached a different opinion from both Dr. Dee and Dr. Herkov. (PCR871). Psychology is not an exact science, and differences of opinion do not necessarily invalidate another expert's opinion. (PCR870-71). Darling showed no symptoms of

post-traumatic stress syndrome. (PCR873).

Francis Iennaco, trial attorney for Darling, was appointed as co-counsel to Mr. LeBlanc. (PCR959). Iennaco has a lot of education in the sciences, so he focused on the scientific portions of the trial. (PCR959). Iennaco practiced criminal defense for seven to eight years before this case. He was Chief of one of the felony divisions at the Public Defender office. (PCR960). He had conducted approximately 35-40 felony jury trials at the time of Darling's case. (PCR961). Iennaco had worked with Don West, preeminent capital attorney, on one capital case. (PCR 962-63). Iennaco considered Darling's case a good guilt phase case, and thought the judge should have granted a judgment of acquittal. (PCR965, 976). Iennaco deposed David Baer, the DNA lab analyst, and "nothing jumped out" at him as a glaring problem. (PCR969). The attorneys knew Darling had an affair with the victim. (PCR969, 970). Darling even wrote a note for the attorneys during trial that said:

> I have known Grace for six months and been sexually active with her for about two months off and on because of her boyfriend.

(PCR973, 1027). This knowledge affected the way Iennaco approached the DNA evidence. If Darling had indicated he never had sex with the victim, then they would have attacked the evidence because it would have had to have been wrong. But

since he admitted to it, they could still attack the evidence, but not spend "months of time banging our head against the wall." (PCR974). Trial counsel moved for a DNA expert, but then decided not to attack the DNA results. (PCR975). They knew Darling had sex with the victim, and DNA is very difficult to successfully attack, particularly when the DNA almost certainly belonged to Darling. (PCR975).

There was no reason to attack the DNA when they had a perfectly valid defense. (PCR975). The fingerprint on the lotion bottle was easily explained because they lived in the same apartment building and knew each other. (PCR976).

The mitigation investigation was conducted by attorney LeBlanc and investigator Barbara Pizarroz. Pizarroz went to the Bahamas to interview the family, obtain medical and school records, obtain a criminal history, and look at all his files. (PCR978). Darling's basic history was that he lived with his mother and had an abusive father who also abused alcohol. Darling abused drugs and alcohol, had been in trouble in school, and was sent to reform school. (PCR982). Darling's father hit him with a pipe, and Darling sustained a head injury. (PCR983). Iennaco was not involved with the mitigation, so his recollection was mainly from hearing the testimony. (PCR983).

LeBlanc testified that he is capital-qualified to defend

death penalty cases. (PCR1020). He attends “Life Over Death” or “Death is Different” every year. He practices 100% criminal defense. (PCR1021). At the time of the hearing, LeBlanc was working on his 40th or 41st homicide case. He had two clients on death row. He had successfully defended against the death penalty numerous times. In two cases in which the State was seeking the death penalty, the jury returned verdicts of manslaughter. (PCR1022). LeBlanc requested co-counsel, an investigator, and a mental health expert be appointed in Darling’s case. (PCR1024, 1028). The investigator he requested had worked for the public defender in capital cases and was familiar with what was needed to prepare for a penalty phase. (PCR1024). The investigator went to the Bahamas and spent several days interviewing family members and meeting with the dean of Darling’s schools. She met with Darling’s father, girlfriend, sister, and mother. She conducted a complete background investigation and met with Darling on numerous occasions. (PCR1025). LeBlanc also spoke with family members and was aware of Daring’s background. (PCR1030). The attorneys discovered more from family members than from Darling who seemed to be embarrassed by his past. (PCR1031). Darling mentioned that he was abused, possibly sexually, by someone at a school dormitory of a youthful offender facility. (PCR1031). LeBlanc

requested costs to bring witnesses from the Bahamas, including Carlton Darling. (PCR1032). They did not have time to purchase the tickets in advance, so they had to reimburse the witnesses. As to Carlton Darling:

> [a]t some point during the week of the penalty phase just, I don't know if refused is the right word, but did not show up as we had expected him to.

(PCR1032). Carlton's testimony would have been a significant part of the mitigation, and LeBlanc expected him to come to the trial. (PCR1032). LeBlanc could not recall specifically why Carlton did not appear; however, he believed that Carlton had a new wife and child and did not want to come forward. Carlton realized that the attorneys

> [w]eren't intending necessarily to embarrass him, but that we might demonize him in front of the jury and portray his as an alcoholic, and I think at that point he was reluctant to come forward to have himself presented that way.

(PCR 1033). They begged Carlton to come. (PCR1033). They expected him to come, but "he simply didn't get on the plane." (PCR1048). Ms. Smith, or one of the family members who did come to the trial, called Carlton and he never got on the plane. (PCR1048). When Carlton did not appear, the attorneys presented the evidence through other witnesses: through Ms. Smith, Darling's mother; through Ms. Clear, the mother of Darling's

child; and through Darling's sister. The sister and mother were quite aware of Carlton's physical and alcohol abuse. (PCR1034). Everything that was to come in through Carlton about the home life was presented through the testimony of the sister, mother, or Dr. Herkov. (PCR1037).

LeBlanc hired Dr. Herkov because he was recommended by another capital defense attorney and was on the list of experts provided at "Life Over Death." (PCR1029). Dr. Herkov reviewed documents, interviewed Darling, and conducted tests as itemized in his billing records. (PCR1038). If Dr. Herkov had made a DSM diagnosis of anti-social personality disorder, LeBlanc would not "want to throw that to the jury as a diagnosis." (PCR1039). LeBlanc made notes of all the mitigation presented to the trial judge, including age as a statutory mitigator (CPR1035, State Exhibit 7). They presented evidence of twenty mitigating circumstances. (PCR1037).

Darling was always a perfect gentleman with his attorneys. He was well-spoken, cared for his family, and was interested in the preparation of his defense. (PCR1039). Between the guilt and penalty phases, Darling asked to dismiss his attorneys because "someone at the jail told him he needed to do that." LeBlanc and Iennaco talked to Darling and continued to represent him. Darling even asked them to do his appeal. (PCR1040).

LeBlanc obtained permission to obtain a DNA expert and to pay him more than the standard fee; however, when Darling admitting having an affair with the victim, it seemed pointless to challenge the results through a DNA expert. (PCR1045). Likewise with the fingerprint on the lotion bottle: Darling admitted being in the apartment and having sex with the victim which would explain his prints. (PCR1045). They made a strategic decision not to challenge the fingerprint examiner. (PCR1054, 1056).LeBlanc's general strategy for the penalty phase was to:

> [p]resent my client as a good human being in almost any case and to present other witnesses as the demons that caused him to create whatever sort of behavior he's n trial for, but I don't think in general I ever make it a policy to demonize my client in front of the jury.

(PCR1060).

Carlton Darling's deposition in the 1998 trial was admitted over objection. (PCR1137-1139). The purpose of the deposition was to impeach the testimony of LeBlanc and Iennaco. The State's objection was that LeBlanc and Iennaco were never questioned about the deposition which was not introduced until after their testimony. (PCR1138). The deposition was not part of the 1998 trial record, nor was it listed as an exhibit for the evidentiary hearing. (PCR1138). The State argued it was

improper impeachment. (PCR1139). The trial court allowed the evidence but cautioned collateral counsel that they not only violated the discovery rules but also failed to confront the witnesses with the deposition as impeachment. (PCR1140).

Tony Moss, the fingerprint examiner who testified at Darling's trial, was qualified as an expert in latent fingerprint identification. (PCR1065). Collateral counsel moved to exclude Mr. Moss as a witness because they were not provided negatives of the photos of the fingerprint on the lotion bottle. (PCR1091). The trial judge told the State to secure the negatives and bring them to court the next morning. The State complied, and the negatives were introduced into evidence. (PCR1093-94). The judge denied the defense request to exclude Tony Moss. (PCR1095). Collateral counsel requested time for their expert Mervin Smith, to review the negatives, and advised that Smith was in the Virgin Islands. (PCR1097). The trial judge told collateral counsel they could re-open their case for Smith to testify, and set a hearing date. (PCR1097).

Moss then explained the process of fingerprint identification and how he identified Darling's print on the lotion bottle. (PCR1112-17). Moss showed the trial judge 15 points of identification and opined that the print on the lotion bottle was that of Darling. (PCR1119). Moss originally found 20

points of identification using his magnifying glass. Moss brought his "comparater," a machine which enlarges fingerprints, to court and said that he would identify all 20 points of comparison for the court if he could bring in the comparater and have a little time. (PCR1119-21). Moss had never made a mistake in fingerprint identification in nineteen years. (PCR1124).

The hearing reconvened on May 3, 2004. Mervin Smith, the defense fingerprint expert was present in the courtroom. Collateral counsel represented that Smith could not say whether or not there was a match. Smith had reviewed the negatives provided by the State, but he needed an enlargement in order to examine the prints. Counsel then stated:

> Where I think we're at now is a – is not support for claim of ineffective assistance of counsel with regard to failure to obtain an expert with regard to fingerprints, where we're at is still at what we contend is a disclosure violation.

(PCR77). The trial court found there was fault on both sides as to the disclosure, but there was no bad faith on the part of either side. (PCR80). The court decided the proper remedy was to recess the hearing until Smith could obtain the enlargements of the negatives he needed. (PCR81). Smith told the court exactly what he needed in order to conduct an examination. (PCR90).

The court reconvened on May 7, 2004. Collateral counsel

advised the court that the State had provided everything Smith required, but that they were not calling him as a witness. (PCR112). Collateral counsel stated:

> MR. GRUBER: ...And I – I'm not going to proceed with further testimony on the matter. And, um, I—I'm not sure how much I have to say in that regard, but I—
>
> THE COURT: I don't know that you have to say anymore. We have the deposition in evidence. I've read it. And, basically, his opinion was inconclusive. He was not in a position to say anything one way or another.
>
> MR. GRUBER: I don't –
>
> THE COURT: Is that a fair representation?
>
> MR. GRUBER: Yes, sir.

(PCR112). The State renewed its objection to the deposition of Smith being admitted since the State had no opportunity to cross-examine the witness. (PCR112-113, 687, 787).

Taxi Robbery/Christoper Smith Proffer. When collateral counsel was outlining his case for the judge, he stated that he subpoenaed the attorney in the "taxi robbery" case, Chris Smith. (PCR697). The State objected to the late disclosure of Smith. The State had not received the witness' name, although the Assistant State Attorney's secretary said she just received a supplemental witness list at the office. (PCR698). The State asked the court to exclude the witness. (PCR698). Collateral

counsel stated that:

> [w]e would be entitled to call him without any notice at all at this point, just straight as rebuttal to what the State has brought up.

(PCR698). Smith was being called to testify he entered a plea in the taxi robbery case without knowing there were pending capital charges.[13] (PCR699). The State responded that there was nothing to rebut insofar as the merits of the taxi robbery, so Smith's testimony was not relevant. (PCR701). The trial judge said he would not rule on the State's objection. (PCR701). The issue was later addressed and the request for Chris Smith to testify in the defense case-in-chief denied. The trial judge said Mr. Smith could be called in rebuttal (PCR789).

Collateral counsel later asked for clarification of the trial court's ruling as to "why Chris Smith is only allowed to be called as a rebuttal witness." (PCR896). Counsel argued that the testimony of Chris Smith, trial counsel in the "taxi robbery" which was used as a prior violent felony in aggravation of Darling's murder case, was relevant to the ineffective

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13 Darling raped and murdered Ms. Mlynarczyk on October 29, 1996. He robbed and shot a taxi driver on November 7, 1996. On April 3, 1997, He pled to the taxi charges - Carjacking with a Deadly Weapon, Robbery without a Deadly Weapon, and Aggravated Battery with a Deadly Weapon - and was sentenced to three concurrent sentences of ten years, six months on April 4, 1997. He was indicted in the murder case on June 12, 1997, and arrested on that charge August 29, 1997.

assistance claims in the murder case. (PCR896). Collateral counsel's theory was that trial counsel in the murder case had a duty to investigate the underlying crimes used as aggravating circumstances. (PCR897). Because counsel never contacted Chris Smith for input on the underlying felony, they were ineffective. (PCR897). Because counsel failed to move to withdraw the plea in the taxi robbery case, they were ineffective. (PCR897). Trial counsel in the murder case should have asked to be appointed in the taxi robbery case for purposes of filing a Rule 3.850 motion. Darling filed the motion *pro se,* was granted an evidentiary hearing,[14] and the motion was denied. (PCR898). Collateral counsel admitted the claim was not specifically pled in Darling's Rule 3.851 motion, but that the State had agreed to a hearing on penalty phase ineffective assistance of counsel. (PCR899). The State objected to this characterization, and repeated that the issue now presented to the court was never addressed in the pleadings. (PCR900). Furthermore, collateral counsel had just given the State a package of materials regarding the taxi robbery. (PCR900). The State pointed out that Judge MacKinnon ruled in the post-conviction proceedings in the taxi case that Darling was not entitled to an attorney, and

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14 The evidentiary hearing was October 8, 1997. (PCR899). Darling filed a motion for counsel on August 19, 1997 (PCR929). The

denied relief because Darling entered into a voluntary plea agreement after a full confession. (PCR900).

The trial judge agreed that the post-conviction proceedings in the taxi case were outside the claims made in the murder case. The judge also noted:

> We've had a year run up to this hearing, and this claim of ineffective assistance of counsel for failure to seek to set aside a prior conviction is not found in these claims; and even construing claims that are here broadly, it's outside the pleadings.

(PCR902). The judge then said he would allow Mr. Smith to be called in rebuttal *if* there was any claim to rebut. (PCR902). Collateral counsel then requested to be able to proffer Smith's testimony, which the trial court allowed. (PC903).

Chris Smith testified that he was appointed to represent Darling on charges of Carjacking, Attempted First-degree Murder, and Armed Robbery. (PCR905). Smith filed a notice of appearance, demand for discovery, statement of particulars, plea of not guilty, and request for jury trial on February 10, 1997. (PCR907). Darling pled guilty on April 3, 1997, to lesser-included offenses and was sentenced to 126 months. (PCR909). Smith was not aware Darling was a suspect in a first-degree murder case. (PCR910). However, he knew Darling was pending extradition to the Bahamas. (PCR910).

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motion was denied on August 27, 1997 (PCR929).

Darling confessed in the taxi case. Smith considered filing a motion to suppress the confession; however, the plea offer was made before he pursued the motion. (PCR913). Smith was aware Darling had consumed cocaine the night of the taxi robbery. (PCR914). Darling never said he didn't know what he was doing, but he did say he was "high." (PCR914). Smith would have challenged the robbery case if he had known it was going to be used as an aggravator in a capital case. (PCR915). Trial counsel in the murder case, LeBlanc and Iennaco, contacted Smith about the taxi case, but it was after the Rule 3.850 hearing in the taxi case. (PCR915).

Darling's objective in the taxi case was to obtain a sentence under ten years, hopefully eight years. The original offer was fifteen years. The day of the plea hearing, the State offered ten. (PCR922).

The facts of the taxi case were as followed: the police received a tip that Darling committed the attempted murder/carjacking and would be at an apartment complex. The police saw Darling and called his name. Darling dropped a baggie of marijuana. The police found a gun on him that matched the gun used to shoot the taxi driver. Darling confessed. (PCR927). The taxi driver, Mr. Geraldo, survived and was available to testify even though he was a reluctant witness.

Geraldo testified at the penalty phase of the murder trial. (PCR928). Smith knew the State could carry their burden. Judge MacKinnon, in her 3.850 denial, found the evidence was overwhelming. (PCR932-33). The State had an eyewitness who told police where Darling lived, the gun found on Darling matched the ballistics of the bullet in the victim's head, and Darling confessed. (PCR942).

At the time Smith represented Darling, he was not aware of any capital case or murder investigation. (PCR934). Darling did not advise Smith there might be murder charges, just that he was facing extradition to the Bahamas. (PCR935). No one from the State Attorney's Office told Smith that Darling was being investigated for murder. (PCR 938).

The testimony of LeBlanc and Iennaco was proffered on this subject. Iennaco was aware of the taxi robbery conviction. He "absolutely" investigated that prior violent felony because it was a "huge concern."(PCR1011). The attorneys looked into whether they could set aside the plea or move to withdraw the plea. (PCR1011). The plea in the taxi robbery case was entered in April 1997, LeBlanc was appointed to the murder case in August or September 1997, and the motion for Iennaco as co-counsel was granted the end of October. (PCR1011, 1013). Iennaco could find no way to challenge the plea. (PCR1011,

1016). The taxi robbery occurred after the murder, and Iennaco looked into whether that could be considered a "prior" conviction. He argued in the penalty phase that the robbery should not be considered a "prior" conviction. (PCR1012). He also challenged the aggravating circumstances of "cold, calculated" and "heinous, atrocious" and prevented the State from presenting evidence on those two aggravators. (PCR1013).

Chris Smith is an excellent lawyer. Iennaco is "pretty sure" he talked to Smith. (PCR1012). Iennaco was not aware Darling filed a Rule 3.850 motion which alleged Mr. Smith was ineffective. (PCR1013). However, if there was a hearing on the motion and appeal, he would think he would have been aware of it. (PCR1014, 1016). If the motion were completely frivolous, Iennaco would not have intervened. (PCR1017). During a recess, Iennaco pulled his file and found the file on the taxi robbery case. He had the post-conviction motion and the State's response together with handwritten notes as to why he did not think it was something they could successfully attack. (PCR1019).

SUMMARY OF ARGUMENTS

Claim I: The portion of this claim based on *Ake v. Oklahoma*, is procedurally barred. Trial counsel were not ineffective in the penalty phase. Counsel hired a mitigation investigator who traveled to the Bahamas to investigate Darling's background and interview family members. Darling's complete history was presented to the jury. The evidence presented at the evidentiary hearing was cumulative. Furthermore, the fact Darling has anti-social personality disorder, belonged to a gang, escaped from prison, was a juvenile delinquent, and lied, cheated and stole his way through his juvenile years, would not present Darling in the positive light trial counsel strived to present.

Claim II: This issue was not raised in the Rule 3.851 motion and is not reviewable. Whether counsel in the prior conviction was ineffective is likewise not reviewable in this case. In addition to the procedural bars, the issue has no merit. The trial court allowed a proffer on this issue which showed trial counsel was not ineffective for failing to challenge the prior violent felony. Mr. Iennaco investigated the case and the plea and found no way to challenge the prior case. The evidence in the prior violent felony, the carjacking and attempted murder of a cab driver, was overwhelming.

Claim III: The trial court did not abuse its discretion by excluding the testimony of Christopher Smith, Darling's attorney in a prior-violent-felony case, the taxi robbery. The issue was not raised in the Rule 3.851 motion and was not properly before the court. The trial court allowed a proffer. Collateral counsel was trying to raise ineffective assistance of counsel in the prior violent felony, an issue which was ruled on by another judge in that case and appealed to the Fifth District Court of Appeal. This is an attempt to re-litigate an issue which is procedurally barred.

Claim IV: The trial court did not abuse its discretion in ruling on the public records requests. Janine Arvizu requested numerous technical documents from FDLE, some of which FDLE personnel could not decipher exactly what was requested until Ms. Arvizu went to the actual laboratory. Documents then were provided and she was allowed free rein. Some of the documents simply did not exist. Ms. Arvizu was allowed to recess and resume her testimony after viewing documents, and to file a supplemental report. Darling never asked the trial court to file an amended point, and this issue is procedurally barred.

Claim V: Counsel was not ineffective for failing to hire a quality assurance analyst to challenge the DNA results. First, Ms. Arvizu did nothing more than audit the lab as to policies

and procedures. She was not qualified to give an opinion on whether the DNA results were accurate. There was no question the DNA results were accurate: Darling told his attorneys he had an affair with the victim. David Baer, the DNA analyst at Darling's trial, had never failed a proficiency exam. The FDLE lab was accredited and passed both internal and external audits. Trial counsel did question the statistical data used to compare DNA results; however, they had no good faith basis to challenge the actual DNA testing. Counsel made a reasonable strategic decision.

Claim VI: The issue of the fingerprint comparison was abandoned at the trial level. Darling did not call his fingerprint expert to testify, but asked to admit his deposition over objection. The trial court accepted the deposition but noted it was inconclusive. Not only was this issue abandoned for lack of proof, it has no merit. Tony Moss identified 15 points of comparison and said he would identify 20 points if the judge allowed him to bring his comparater into the courtroom and had time for the exercise. His testimony that the fingerprint on the lotion bottle was Darling's was unrebutted.

Claims VII and VIII: The claims regarding improper prosecutorial argument and jury instructions are procedurally barred. Raising the claims as ineffective assistance of counsel

will not resurrect the claims.

Claims IX and X: Darling concedes these claims have no merit and are raised solely for the purpose of preservation.

CLAIM I

COUNSEL WAS NOT INEFFECTIVE IN THE INVESTIGATION AND PRESENTATION OF MITIGATING CIRCUMSTANCES.

Darling argues that trial counsel was ineffective for failing to present the testimony of Carlton Darling, Lance McIntosh, and Montico Rahmings at the penalty phase. Counsel was also allegedly ineffective for failing to request a neuropsychological examination rather than rely on their mental health expert, Dr. Herkov. Since Dr. Dee has now testified that Darling has "frontal lobe" damage, counsel was ineffective for failing to discover this brain damage.[15] Darling outlines the

15 The portion of the claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), was raised as Claim IX and summarily denied because it is procedurally barred. (PCR 1541-42). *See Marshall v. State*, 854 So. 2d 1235, 1248 (Fla. 2003) (holding an *Ake* claim contained within an ineffective assistance of counsel claim "procedurally barred because it could have been raised on direct appeal"); *Moore v. State*, 820 So. 2d 199, 203 n.4 (Fla. 2002) (finding *Ake* claim procedurally barred because it could have been raised on direct appeal); *Cherry v. State*, 781 So. 2d 1040, 1047 (Fla. 2000) ("The claim of incompetent mental health

"wealth" of mitigating evidence that was presented at the evidentiary hearing (Initial Brief at 35, 36-71).

The trial court held:

> **Claims IV/XV:[16] Mr. Darling was denied his rights to the effective assistance of counsel and mental health experts during the sentencing phase of his capital case, when critical information regarding Mr. Darling's mental state was not provided to the jury and judge, all in violation of Mr. Darling's rights to due process and equal protection under the fourteenth amendment to the United States Constitution, as well as his rights under the fifth, sixth, and eighth amendments.**
>
> Defendant claims that counsel was ineffective for failing to investigate his background, hire the necessary mental health experts and provide them with available background material, supervise the administration of mental health tests, and present a "wealth" of available mitigation to the jury. He asserts this is so because counsel failed to present any of the following information to the penalty phase jury: information regarding his significant head injuries, the fact that he is "almost certainly" learning disabled, beatings inflicted by his father Carlton Darling ("Carlton") as well as police officers and prison guards, treatment that he received while incarcerated at the Boy's Industrial

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evaluation is procedurally barred for failure to raise it on direct appeal.").

16 The trial judge used the exact captions as the claims in the Motion to Vacate.

School, his substance abuse and gang membership, his exposure to adult sexual situations and materials as a child, and his sexual attitudes and values, as well as his perceptions of women.

The Florida supreme court summarized the penalty phase evidence as follows:

> Darling then presented four penalty phase witnesses. Bahamian Deshane Claer testified that Darling was the father of her three-year old daughter, Divinka. Claer stated that Darling had provided emotional support during her pregnancy, although she had no contact with Darling from the time she first learned she was pregnant until four or five months later. Shortly thereafter, Divinka was born, and, the next month, Darling left for the United States. Claer stated that Darling had maintained contact with her, sending Christmas, birthday and Valentine's cards and other communications to her and their daughter, about whom he expressed concern.
>
> Darling's sister, Verneki Butler, a computer teacher in the Bahamas, also testified. Butler stated that her parents, although not married, had lived together, and were both employed outside the home. The children had plenty of food, good clothes, and other necessary provisions while growing up, and they attended church. Her father was

considered "a good hard-working citizen and a success," who supported his family well, and helped Butler to go to college.

However, Butler stated that she had suffered extreme emotional difficulties related to her father, in part, because of embarrassment arising from his many extramarital affairs. Butler also testified that her father was “very verbally abusive" to her, and that he was verbally, emotionally, and physically abusive to her mother and Darling. She stated the abuse directed to her mother had started a little before she left home to go to college (at age sixteen), and that most of it occurred while she was gone. However, she had heard reports from her mother and, upon returning home after graduation from college, she "saw it again." The worst incident she ever witnessed was when Darling was beaten with a P.V.C. pipe because he had missed a meeting with his probation officer. In another incident, Darling was beaten because their father had to wait for him. At other times, Darling was beaten when "he tried to separate a fight" between his parents. Butler did not think that Darling was like their father, because "[t]o me he shows more love."

Darling's mother, Eleanor Bessie Smith, testified. She stated that Darling's father, Carlton, had

provided for the children, and the two of them had built the family's middle class home together. Smith stated that Carlton's alcoholism "was a problem in the home." She stated that Carlton "was abusive with [her]" and was verbally abusive toward Verneki "when he drinks." After Darling began college, his father "never cared for him at all," and Darling complained that he wanted Carlton to "show some interest in him, not just to put food on the table." Smith said that, on many occasions, Darling would try to defend her from Carlton, and would receive "bruises" as a result. Smith believed that Carlton's relationships with other women were embarrassing for Darling. She had brought Darling up to believe in God, and she related that Darling had kept in touch and demonstrated concern for her while he was in jail.

Darling's last witness was Dr. Michael Herkov, who was accepted without objection as an expert in forensic psychology. Dr. Herkov did a clinical interview with Darling, reviewed some of the discovery provided by the State, and evaluated Darling. He also consulted with investigators, interviewed family members, and read Carlton's deposition. Carlton indicated that his relationship with Darling had deteriorated because "as he entered the teen years he got in trouble and

was difficult to discipline." Darling's family members described him to Dr. Herkov as "a very good person, very polite, very non-violent, very loving to his children and a good domestic partner, caring, et cetera, et cetera." However, Dr. Herkov testified that it was quite possible that Darling appeared one way to family members and was still capable of committing murder. Dr. Herkov also read the statement of Harlan Deen (a headmaster at one of the Bahamian schools Darling attended), and spoke with Darling's probation officer, Debra Rolle. Deen had reported to Dr. Herkov that Darling (whom Deen described as a "bully") could "appear to be very compliant and cooperative and friendly and then do a lot of things that were inconsistent with that."

Dr. Herkov indicated that Darling's I.Q. of 84 was "about a middle low average range," and that there was "some evidence to suggest a learning disability," but "no diagnosis." Dr. Herkov said that Darling's problems in school were "certainly consistent with somebody who's been abused." Dr. Herkov said that physically abused children "are much more likely to get in trouble with the legal system, to have crimes that are violent," and to engage in "antisocial behaviors." Nonetheless, Dr. Herkov opined that, knowing everything that had happened to Darling as a child, he could not "at

> all" say that it excused his behavior in this case, nor did Dr. Herkov conclude that the abuse could lead Darling to do something that he did not know he was doing.

Id. at 153-154 (footnote omitted).

During the evidentiary hearing, Carlton stated that he and Dolan's mother never married. (EH. 20, 49.) Any time that Carlton spent with Defendant was generally restricted to picking him up from school and administering beatings, usually with his fists and/or a PVC pipe. (EH. 23, 32, 35, 36, 40, 41.) Defendant was beaten approximately six times a week, and Carlton would typically hit Defendant wherever he (Carlton) "could get a good hit." (EH. 23-25, 28, 31, 40, 4l.)[9]. Carlton admitted he had a drinking problem and that he was physically abusive toward Defendant's mother in front of Defendant. (EH. 25, 27.) When Defendant was approximately 13 years old, he would sometimes spend time at the cabaret where Carlton worked and where topless and/or scantily clad women were paid to entertain men. (EH. 33-36, 75-76.)

> Fn. 9. During one episode, Defendant was beaten so badly he bled through the nose. (EH. 32.)

Mario Smith ("Mario"), Defendant's first cousin, testified that he was employed as a prison guard at Foxhill Prison (in the Bahamas) while Defendant was incarcerated there, (EH. 81, 82, 88.) Defendant was 17 or 18 at the time, and juveniles were not separated from adult prisoners, nor were mentally ill patients separated from the general population. (EH. 88, 89.) Mario described the prison as having a "deplorable" smell, as well as rats, roaches, and lice. Additionally, there was

no running water and the small, unlit cells each housed five or six inmates. (EH. 82-86, 90.) The toilet facilities consisted of shared five-gallon buckets, which were only emptied once a day. (EH. 85,86,105,106.) Executions by hanging were carried out at the prison, and Mario believed Defendant was there when one took place. (EH. 86, 87.) The prison guards were generally indifferent and would beat prisoners with a rubber hose for perceived discipline violations or because they held grudges against them. (EH. 92-94.) Mario stated that he never saw Defendant being beaten, nor Defendant complain that he had been beaten. (EH. 97, 98, 104.) Mario testified that the prisoners were allowed to get toiletries on Sunday from friends and family, and were able to wash themselves in the cells, (EH. 101, 102.) He further testified that Defendant's mother and sister visited Defendant and provided him with what he needed. (BH. 103,104.)

Defendant's friends Lance McIntosh ("McIntosh") and Montico Rahming ("Rahming"),[10] were deposed on April 22, 2004.[11] McIntosh testified that Defendant was like a brother to him, and was a nice person. (McIntosh. 3, 5.) He further testified that growing up on the island was not easy and both he and Defendant joined a gang to cope with the difficulties. (McIntosh. 4, 5.) Drugs were a "wide thing" on the island, and easy to get. (McIntosh. 13, 14.) Smoking dope (marijuana) was a common occurrence and sometimes it was laced with cocaine, however, “marijuana was mostly our thing." (McIntosh. 6, 14, 15) McIntosh characterized Defendant as a "big smoker." (McIntosh. 6.) McIntosh stated that the police would harass people and would hit them to force them to talk about things they knew nothing about. (McIntosh. 8.) McIntosh witnessed Defendant being beaten repeatedly about the head with a police radio because he was unable to provide the police officer

with the information the officer wanted. (McIntosh. 8-10.) McIntosh was sent to Fox Hill prison in 1996; however, Defendant was not there at the time. (McIntosh. 17, 18.) McIntosh described the prison conditions much as Mario did. (McIntosh. 19-21.) McIntosh stated that Defendant told him that he was beaten between the legs with billy clubs while showering at the prison. (McIntosh. 24-26.)

> Fn.10. Both McIntosh and Rahmings live in the Bahamas.

> Fn.11. Both depositions were received into evidence. (EH. 185.)

Rahming, who had known Defendant for seventeen years, described him as the type of person who would give you the shoes off his feet or the shirt off his back. (Rahming. 55, 66.) Rahming also had a stay at Foxhill prison and described the conditions just as McIntosh and Mario had. (Rahming, 57-59.) Rahming was housed next to Defendant and stated that the guards went into Defendant's cell and beat him for approximately 20 minutes with a bat or billy club. (Rahming. 59, 60, 63, 64.)

Marjorie Hammock ("Hammock"),[12] offered a biopsychosocial assessment of Defendant based on interviews with Defendant, his parents, and his older brother, along with her reviews of school records and the psychological and neuropsychological evaluations conducted by Drs. Henry Dee ("Dr. Dee"), and Mark Cunningham ("Dr. Cunningham"). (EH. 115, 116,177.) Hammock also spoke with several of Defendant's friends and traveled to the Bahamas to "get a sense" of where Defendant grew up. (EH. 116.)[13] Hammock stated that Defendant had a fairly extensive history of head injuries from blows, falling off bicycles, and beatings that continued throughout his early

adolescence; as a result of these injuries, Defendant lost consciousness on at least two occasions. (EH. 121, 131,132.) Frequent nosebleeds began early in life and reoccurred in adolescence. (EH. 121.) In addition to the known physical abuse administered by Carlton, Defendant also suffered emotional abuse from both parents, resulting in a "lack of connection." (EH. 121, 122.) Although he tried very hard, Defendant was not a good student. (EH. 122.) Hammock opined that there were many challenges in Defendant's early childhood that led to him becoming "someone who is quite compromised" and that Defendant had a learning problem that may have been related to his emotional and physical conditions. (EH. 122, 128.) Hammock also noted that, while he was in the "early grades," Defendant began stuttering or stammering whenever he was under stress or distress, or after he had been physically hurt. (EH. 133.) Defendant began to experiment with alcohol when he was around eleven or twelve years old, and marijuana followed a year later. (EH. 139.) Eventually he consumed marijuana on a daily basis, and crack cocaine every other day. (EH. 139,141.) Based on Dr. Dee's testing, Hammock stated that Defendant scored in the low/average intelligence range. (EH. 177, 207.) She further stated that when he was nine years old, Defendant scored in the average or low average range in standardized intelligence tests. (EH. 178-181.) Hammock testified that she was told that while Defendant was in a police station in the Bahamas, he escaped due to a mix-up. (EH. 186.) Even though she was not clear about the details, she knew Defendant was able to leave the Bahamas as a stowaway on a cruise ship. (EH. 185-187.) Hammock agreed that Defendant's ability to get to the United States and find work and an apartment was an aspect of his adaptive skills. (EH. 187- 189.)

Fn.12. Hammock is a licensed clinical social worker and a professor at Benedict College in Columbia, South Carolina, where she teaches social work courses. (EH. 109.) She has also been used as an expert witness in death penalty cases. (EH. 109.) The Court found Hammock was qualified to testify under section 90.702, Florida Statutes. (EH. 113.)

Fn.13. Although not related to the instant case, Hammock had previously visited Foxhill Prison. Her description of the prison matched that of Mario, McIntosh, and Rahmings. (EH. 116, 119,120.)

Dr. Cunningham[14] testified that he interviewed Defendant, his parents, and Mario. (EH. 258.) He reviewed Dr. Dee's testing summaries and deposition, and spoke to Dr. Dee telephonically. (EH. 258.) Dr. Cunningham also reviewed, *inter alia,* statements and/or testimony from Deshane Claer,[15] Dr. Herkov, and Defendant's mother and sister, Defendant's school records, the opening and closing statements from both the guilt and penalty phases of Defendant's trial, Dr. Herkov's deposition, and research literature. (EH. 258, 259, 261.) Based on his investigation, Dr. Cunningham identified four primary arenas of mitigating circumstances:(1) "faulty wiring" (i.e., evidence of neuropsychological cognitive dysfunction); (2) parental poisoning (i.e., generational dysfunctional family scripts); (3) sexual poisoning (i.e., dysfunctional family attachments); and (4) community poisoning (i.e., inadequate community guidance and intervention). (EH. 262, 263.) When asked if Defendant met the criteria for a Diagnostic and Statistical Manual IV Text Revision Diagnosis for post-traumatic stress disorder, Dr. Cunningham stated that he had

not attempted to diagnose Defendant's current psychological status. (EH. 433, 434.)

> Fn.14. Dr. Cunningham stated that he was a clinical and forensic psychologist in private practice. (EH. 239.) The Court found that he was qualified to testify under section 90.702, Florida Statutes. (EH. 255.)
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> Fn.15. As noted in the summary of the penalty phase evidence, Claer is the mother of Defendant's daughter Divinka.

Dr. Dee[16] testified that he interviewed Defendant[17] and conducted a neuropsychological evaluation on him on October 17, 2003.[18] (EH. 475, 476). During the evaluation, Dr. Dee used *inter alia,* the Wechsler Intelligence Scale, Wechsler Adult Intelligence Scale, and the Denman Neuropsychology Neuroscale. (EH. 496.)[19] On the Wechsler Intelligence Scale, Defendant's full scale IQ was 89, which Dr. Dee characterized as low average or dull normal. (EH. 499.) On the Denman test, Defendant had a full scale IQ of 93, which Dr. Dee characterized as pretty much the same as Defendant's IQ on the Wechsler test. (EH. 507, 508.) Defendant was unable to perform the Wisconsin Card Sorting Test and failed the Categories test, both of which are designed to identify frontal lobe damage. (EH. 505, 506, 511, 512.) Dr. Dee stated that he reviewed, *inter alia,* Defendant's school records, the transcript of the penalty phase of the trial, Dr. Cunningham's deposition and records from the Bahamas, the MMPI given to Defendant in December 1998 by Dr. Herkov, and Dr. Herkov's statement and testimony. (EH. 477-480.) Dr. Dee regarded Defendant's history of head trauma to be neuropsychologically significant, and stated there was a great

deal in Defendant's environmental circumstances and family history that could be “fertile" in relation to Defendant's psychological condition. (EH. 492, 494.) He further stated that Defendant's frequent nosebleeds, headaches, nausea, and vomiting might point to a medical condition that was relevant to a neuropsychological evaluation; however, they might also be symptoms of stress. (EH. 494, 495.) Dr. Dee testified that, in the absence of documented medical diagnosis and treatment, it was impossible to establish a nexus between Defendant's physical problems and the subsequent neuropsychological findings. (EH. 495-496.) Based on test results, Dr. Dee diagnosed frontal lobe syndrome,[20] which he regarded as a potentially mitigating factor. (EH. 517.) Dr. Dee opined that frontal lobe damage created a substantial impairment in the ability to conform one's conduct to the requirements of the law. (EH. 559, 560.) He further opined that such an impairment would be consistent with Defendant's behavioral history, which was replete with examples of impulsive and/or violent behavior, and emotional and intemperate things that "don't seem explicable in any other way." (EH. 513, 514, 517, 559.)

Fn.16 Dr Dee stated that he was a clinical psychologist and clinical neuropsychologist. (EH. 471.) The Court found that he was qualified to testify under section 90.702, Florida Statutes. (EH. 475.)

Fn.17. Relevant information from the interview included evidence of beatings, sexual abuse, substance abuse, and unconsciousness following a bicycle accident and a blow with a shovel, after which Defendant developed headaches in the right frontal area of his head. (EH. 483-486.)

Fn.18. Defendant was incarcerated at Union Correctional Institution at the time.

Fn.19. Dr. Dee administered seven tests.

Fn.20. The diagnosis was not based on the Diagnostic and Statistical Manual. (EH. 517.)

Based on the testimony presented at the evidentiary hearing, Defendant alleges that defense counsel was ineffective for failing to investigate the deplorable prison conditions, the gangs, and the Bahamian police, and bringing these issues to the jury's attention. He argues that these "island stories would have negated the powerful effect of the taxi driver's testimony[21].” He further argues that counsel should have had a biopsychosocial assessment performed and should have presented testimony by a licensed clinical social worker. Defendant asserts that counsel mismanaged Dr. Herkov, failed to have a full battery of neuropsychological tests performed, and failed to explore frontal lobe damage and explain its consequences to the jury. He also asserts that Carlton's statements were a “wealth of mitigation” that should have been presented at the penalty phase. Based on these alleged omissions, Defendant argues his death sentence should be vacated and he should be afforded a new penalty phase trial.

Fn.21. Attorney Christopher Smith ("Chris Smith") represented Defendant in Orange County case number 1996-CF-13626 ("taxi case"), wherein Defendant was convicted of shooting a taxi driver. The taxi driver testified at the penalty phase in the instant case.

An attorney has a duty to conduct a reasonable investigation, including an investigation of a defendant's background, for possible mitigating evidence. See Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). However, trial counsel is not ineffective for failing to present evidence in mitigation that is cumulative to evidence already presented in mitigation. See Gudinas v. State, 816 So, 2d 1095, 1106 (Fla. 2002). See also Sweet v. State, 810 So. 2d 854,863-864 (Fla. 2000) (noting that court did not need to reach issue of whether trial counsel was deficient in failing to have additional penalty phase witnesses testify because testimony of witnesses at evidentiary hearing did not establish prejudice where majority of the testimony was cumulative with other witnesses' trial testimony).

Although Defendant contends that counsel was ineffective for failing to have Carlton appear at the penalty phase, (EH. 909-910), counsel testified that Carlton's testimony was presented through other witnesses. (EH. 911.) Furthermore, Dr. Herkov repeatedly referred to Carlton's pre-penalty phase deposition and provided detailed testimony about it. (PT. 125, 149- 150, 166,168.) Both Defendant's family and Dr. Herkov testified to the extreme physical abuse Defendant suffered at Carlton's hands, the alcoholism, and Carlton's aberrant ways. (PT. 124,126.) Dr. Herkov gave detailed testimony concerning the beating that happened at Defendant's school that was considered excessive even by Bahamian standards, and the fact that Defendant tried to stop Carlton from beating his mother. (PT. 124,128,131.) Dr. Herkov discussed Defendant's problems at school, including difficulty in language processing, evidence of a learning disability, low IQ, the difficulty teachers had with Defendant, and the relationship of Defendant's poor grades related to the beatings. (PT. 131, 135-

137,139.) The penalty phase jury knew that Carlton beat Defendant with his fists, a PVC pipe, a closet rod, and a club, that Defendant's parents never married, and that Carlton left the family home when Defendant was sixteen. (PT. 145,166,168.)

Testimony adduced at the evidentiary hearing concerning Foxhill Prison from Mario, McIntosh, Rahmings, and Hammock was really a general comment on existing conditions, and did not conclusively establish that Defendant was beaten while incarcerated there, which is not a statutory mitigating circumstance anyway. McIntosh's testimony that he and Defendant joined a gang was not a statutory mitigating circumstance.

Hammock's testimony about Defendant's history of head injuries, beatings, physical, emotional and educational problems, and his IQ level added very little to the information previously presented by Dr. Herkov, Defendant's mother, and Defendant's sister. Dr. Cunningham's testimony added little or nothing new; instead, it was merely a "cumulative analysis" of the testimony previously presented at the penalty phase. Additionally, Dr, Dee's testimony concerning Defendant's performance on various tests and his poor upbringing was cumulative to the testimony already presented by Defendant's family and Dr. Herkov.

Based on the foregoing, the evidentiary hearing testimony was merely cumulative, adding little or nothing to the mitigation previously presented during the penalty phase of trial. See Darling, 808 So. 2d at 153-154. Accordingly, counsel was not ineffective for falling to have witnesses present testimony reiterating the same information already presented at the penalty phase, and Defendant is not entitled to relief on this claim. See Sweet. 810 So. 2d

> at 863-864. See also Gudinas, 816 So. 2d at 1106.

(PCR 1798-1809).

Darling argues that the testimony at the evidentiary hearing showed that counsel was deficient and Darling was prejudiced. The trial judge found the evidence cumulative. The fact that present counsel has fragmented the evidence into more pieces does not change the weight of the evidence. The life-or-death analysis is a weighing process, not a counting process. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973).

Darling presents only the testimony which he believes supports his position and fails to recognize that the trial court resolved the credibility issues. The standard of review to be applied when this Court reviews a trial court's ruling after an evidentiary hearing is:

> In reviewing a trial court's application of the above law to a rule 3.850 motion following an evidentiary hearing, this Court applies the following standard of review: As long as the trial court's findings are supported by competent substantial evidence, "this Court will not 'substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as the weight to be given to the evidence by the trial court.'"

Demps v. State, 462 So. 2d 1074, 1075 (Fla. 1984),(quoting *Goldfarb v. Robertson*, 82 So. 2d 504, 506 (Fla. 1955)); *Blanco*

v. State, 702 So. 2d 1250, 1252 (Fla. 1997). The trial court order is not only supported by competent substantial evidence, but also, cites to the evidence are contained within the order. Darling argues that the trial court failed to make a credibility determination, then argues the trial court "dismissed" Dr. Cunningham's testimony. The trial judge credited the testimony of Dr. Frank and trial counsel. The trial judge functioned exactly as a trial judge should: resolving conflicts in the testimony and deciding which witnesses are credible.

Darling seems to lose sight of the issue, which is whether counsel was ineffective. Appellant presents selected quotes from *Wiggins v. Smith*, 539 U.S. 510 (2000), and *Rompilla v. Beard*, ___U.S.___, 125 S.Ct. 2456 (2005), as if those cases supported his position in this case. In *Wiggins*, the Court reiterated that:

> *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case.

Wiggins, 539 U.S. at 533. The Court took this a step further in *Rompilla*, stating:

> The duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line

> when they have good reason to think further investigation would be a waste.

Rompilla, 125 S. Ct. at 2463; citing *Wiggins*, 539 U.S. at 525; *Strickland*, 466 U.S. at 699. *See also Ventura v. State*, 794 So. 2d 553, 570 (Fla. 2001) (finding that penalty phase counsel was not deficient for failing to procure the testimony of witnesses for the penalty phase whose testimony would have mirrored the testimony that was offered at that proceeding); *Downs v. State*, 740 So. 2d 506, 516 (Fla. 1999) (affirming the trial court's denial of the defendant's claims that counsel was ineffective for failing to investigate and present additional mitigating evidence where the additional evidence was cumulative to that presented during sentencing); *Rutherford v. State*, 727 So. 2d 216, 224-25 (Fla. 1998) (same); *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997) (same); *Davis v. State*, 30 Fla. L. Weekly S709 (Fla. Oct. 20, 2005)(same).

This Court continuously deals with postconviction cases in which every detail of a defendant’s life is unearthed: the good, the bad and the ugly. The fact that present counsel has paraded more detailed testimony before the court does not change the fact that this testimony was presented previously, and considered by both the jury and the trial judge. That present counsel has found more details to present does not make trial

counsel ineffective. For example, in *Cole v. State*, 841 So. 2d 409 (Fla. 2003), the defendant argued that defense counsel was ineffective for failing to call certain witnesses to corroborate his drug abuse problems. This Court affirmed summary denial because Cole was not entitled to an evidentiary hearing to present what the trial court found would have been cumulative evidence. This Court also faced a similar situation in *Marquard v. State*, 850 So. 2d 417 (Fla. 2002). Marquard claimed ineffective assistance of counsel for failing to call witnesses to testify as to his drug problems and abuse suffered as a child. *Id*. at 429. Defense counsel had introduced this information solely through their expert witness. *Id*. This Court agreed with the circuit court's denial of the claim: Although other witnesses could have provided more details relative to Marquard's early life, counsel is not required to present cumulative evidence. (*citing Maharaj v. State*, 778 So. 2d 944, 957 (Fla. 2000) ("Failure to present cumulative evidence is not ineffective assistance of counsel.")

CLAIM II

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE PRIOR CONVICTION.

Darling next claims that counsel in the "taxi robbery" conviction, Christopher Smith, was ineffective. The taxi robbery

was an aggravating circumstance in this case as a prior violent felony. However, Darling attempts to go beyond this case to challenge the effective assistance of counsel not in this case, but in the prior violent felony. This issue was not raised in the Motion to Vacate and is not properly before this Court.

Darling did, in fact, challenge the prior taxi robbery conviction pursuant to a Rule 3.850 motion he filed in that case in 1997. The motion was denied, Darling appealed to the Fifth District Court of Appeal, and the appeal was dismissed.[17]

All arguments presented in the claim refer to counsel in the taxi robbery case, a case over which this Court does not have jurisdiction. Although Darling argues that the trial judge in the taxi robbery case ruled incorrectly, that was an issue that should have been appealed to the Fifth District Court of Appeal in 1997. Thus, not only is this claim not reviewable, it is time-barred.

Last, Darling cites to testimony from Christopher Smith, trial counsel in the taxi robbery case. As this Court will discover in the next claim, the trial judge excluded this testimony but allowed collateral counsel a proffer. Every argument in this claim has to do with the effectiveness of

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17 Orange County Circuit Court Case No. CR96-13626 and CR96-13627.
Some of the supporting documents were admitted as exhibits during the proffer of Christopher Smith.

Christopher Smith. This is an improper forum to challenge a prior conviction in another case which was presented to a different trial judge, denied, and appealed to the Fifth District.

To the extent Darling argues that trial counsel in the murder case were ineffective for failing to investigate the prior violent felony, this issue is procedurally barred for failure to raise it in the Rule 3.851 motion. Moreover, the issue has no merit. Mr. Iennaco had a complete file on the issue and his notes as to why he could not challenge the prior conviction. He had investigation the prior conviction fully and determined it was not subject to challenge. The proffered testimony showed the overwhelming evidence in the taxi robbery case.

CLAIM III

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN LIMITING TESTIMONY AT THE EVIDENTIARY HEARING TO THE ISSUES PROPERLY BEFORE THE COURT

In another variation of Claim II herein, Darling argues the trial court erred in excluding testimony of Christopher Smith, the attorney for Darling in another case. The trial court allowed a proffer on this issue which was nothing more than a claim of ineffective assistance of Christopher Smith in the prior conviction. As stated in Claim II herein, this issue was

not properly before the trial judge in this case, and the taxi robbery conviction had already been challenged (Judge MacKinnon ruling) and appealed. This issue is procedurally barred and time barred, even if it could be raised in this case.

Darling continues to argue that the prior conviction is defective, but alleges no specific facts as to the alleged defect. He acknowledges that there were no specific facts alleged and that he filed a "shell" motion. (Initial Brief at 79, n.11). The claims raised as a "shell" pleading were stricken by the trial court. (PCR 1563-1564). Even if the stricken claims could be considered, the issues raised in Claims II and III herein were not raised at the trial level.

Darling also admits that the claims raised, and the claims addressed by the trial judge, related to failure of trial counsel to present mental status information/provide adequate mental health assistance. (Initial Brief at 79). He urges this Court to review an issue not raised in the Motion to Vacate. Once again, these claims are procedurally barred both by time and for failure to raise them at the trial level.

Even if the claim raised in Claims II and III herein could be reviewed by this Court, they have no merit. Darling was caught red-handed with the gun with which he shot the taxi driver. He confessed to the carjacking/attempted murder. The

victim was available to testify, and did testify in the penalty phase of the murder case. As Mr. Iennaco testified, he looked into the facts of the taxi robbery and determined that there was no way to successfully challenge the prior conviction.

CLAIM IV

THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN RULING ON PUBLIC RECORDS DISCLOSURE

Darling alleges the State withheld public records, i.e., the FDLE DNA Laboratory Quality Assurance Manual, Standard Operating Procedure Manual, curricula concerning the evidence collection personnel and the contamination control in the lab, and the results of contamination control surveys relevant to DNA testing. Darling acknowledges that when it was discovered that Ms. Arvizu did not have all the documents, the trial court allowed her and the collateral attorneys to go to the FDLE lab, and conduct an audit (Initial Brief at 80). Darling also acknowledges that Ms. Arvizu was allowed not only to take a recess to review documents, but also to file a supplemental report after she had more time to review all the material. (Initial Brief at 81). Darling now complains that collateral counsel was not given an opportunity to review the materials, an issue not raised at the trial level. Darling makes a nebulous claim that he needs to review the documents in order to amend his Motion to Vacate. Darling has had the documents and Ms.

Arvizu's report since May 2004, but points to nothing concrete that could be raised. In any case, the request to file an amended motion was never made to the trial judge and is not reviewable on appeal. The fact is, the trial court bent over backwards to accommodate Ms. Arvizu, and Darling has failed to show there was any abuse of discretion in his treatment of the production of technical records from FDLE which are not specific to this case.

The trial court found:

> **Claim I: Mr. Darling is being denied his rights to due process and equal protection as guaranteed by the Eighth and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution, because access to the files and records pertaining to Mr. Darling's case in the possession of certain state agencies have been withheld in violation of Chapter 119, Flat. Stat. Mr. Darling cannot prepare an adequate 3.851 motion until he has received public records materials and has been afforded due time to review those materials and amend.**
>
> Defendant claims that the Florida Department of Law Enforcement ("FDLE") failed to adequately furnish the public records that this Court ordered to be turned over to counsel, including documentation pertaining to the DNA testing, a copy of the Standard Operating Procedure manual for sample collection and/or training manuals/materials, curricula concerning the evidence collection personnel and the contamination control practiced in the

laboratory, and the results of contamination control surveys relevant to DNA testing.

On December 19, 2002, this Court granted Defendant's June 24, 2002, motion seeking to have the State Public Records Repository ship the public records to the Clerk of the Court for an in-camera inspection by the Court. On October 14, 2002, Defendant filed a demand for additional public records. Following a hearing, an order was rendered on April 16, 2004, allowing collateral counsel to inspect the sealed/exempt records in the possession of the Clerk of the Court. Following a hearing on June 5, 2003, the Court granted Defendant's May 9, 2003, motion to compel FDLE to search, retrieve, and comply with his October 9, 2002, demand for additional public records, or alternatively, to certify that the records did not exist. On January 8, 2004, the Court granted Defendant's August *25,* 2003, motion for copies of all sealed/exempt records held by the Clerk of the Court.

During the evidentiary hearing, defense witness Janine Arvizu ("Arvizu")[4] was provided with the FDLE's Standard Operating Procedures Manual Pertaining to DNA evidence). The Court then directed Arvizu to conduct further on-site investigation, during which she reviewed additional specified documentation. (EH. 1019-1038).[5]

> Fn.4. Arvizu is a quality assurance consultant with Consolidate Technical Services, Inc. (EH. 582.) She performs quality assurance audits and data quality assessments of laboratories, and was qualified to testify as an expert in forensic scientific laboratory quality assurance under section 90.702, Florida Statutes. (EH. 582, 592.)

> Fn.5. Arvizu testified based on her preliminary review of the new material, but asserted she needed time for further review and assessment. (EH. May 3, 2004.17, 22.)
>
> Additionally, at the evidentiary hearing, Defendant's counsel stated that a photographic negative of a fingerprint was still missing. (EH. 7, 8.) After defense witness Mervin Smith ("Smith")[18] received the photographic negative, Defendant's counsel stated during the evidentiary hearing that Smith could not "draw a match." (EH. May 3, 2004.2, 3.) Smith testified that he needed a photograph of the standard rolled fingerprints and two photographs of the latent print.
>
> After examining the negatives already received in evidence, Smith pointed out the ones he needed. (EH. May 3, 2004, 19, 20.) The Court then directed that the negatives be provided to Smith by noon on Wednesday, May 5, 2004. (EH. May 3, 2004.18.)
>
> Based on the foregoing, Defendant received all the records needed to fully present his case at the evidentiary hearing.

(PCR1791-1793). As the trial court found, collateral counsel received all records necessary to present his case. The expert was allowed to file a supplemental report. There was no abuse of discretion.

CLAIM V

18 The “Mervin Smith” issue is raised in Claim VI herein.

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO HIRE A QUALITY ASSURANCE ANALYST TO CHALLENGE DNA RESULTS

Although this claim is raised as an ineffective-assistance claim, Darling does nothing more than criticize several points in the trial court order. Darling fails to inform this Court how this testimony would have changed the outcome of the trial, given the fact Darling did not contest that he had an affair with the victim and advised his attorneys of this fact. Notwithstanding, trial counsel did challenge the statistical aspect of the DNA, an issue which this Court discussed in depth in *Darling v. State*, 808 So. 2d 145 (Fla. 2002). Counsel made a strategic decision to challenge the statistics angle rather than the actual test results19, particularly since Darling told them he had an affair with the victim.

The trial court held:

> **Claim XXXVII: Mr. Darling is denied his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because defense counsel was ineffective for failing to hire the necessary experts to challenge and object to the scientific findings, conclusions, and testimony of the witnesses from the Florida Department of Law Enforcement regarding the purported DNA**

19 To this date Darling has not challenged the actual DNA test results, or requested DNA testing pursuant to Rule 3.853, Fla.R.Crim.P.

evidence.

Defendant claims that the reliability of the DNA testing was in question; however, counsel failed to hire a DNA laboratory expert to challenge the FDLE's laboratory quality assurance standards, thus precluding a pre-trial Frye[25] challenge to the evidence introduced at trial. He argues that a challenge to the evidence would have seriously undermined the DNA testing results and he would have been acquitted. Accordingly, he should be afforded a new trial.[26]

> Fn.25 Frye v. United States, 293 F. 1013(1923).
>
> Fn.26 In support of this argument, Defendant cites to Murray v. State, 838 So. 2d 1073,1081 (Fla. 2002). However, Murray, in which the Florida supreme court concluded that the State did not meet its burden in demonstrating general acceptance of the testing procedures, is inapplicable to the instant case, where Defendant did not raise any issues about general acceptance of the testing procedures.

In examining counsel's performance, courts are required to make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and indulging a strong presumption that counsel rendered effective assistance and made all significant decisions in the exercise of reasonable professional judgment. See White v. State, 729 So. 2d 909, 912 (Fla. 1999). In order to show that an attorney's strategic choice was unreasonable, a defendant must establish that no competent counsel would have made that choice. See Provenzano v. Singletary, 148 F. 3d 1327,

1332 (11th Cir. 1998). See also Occhicone v. State, 768 So. 2d 1037,1048 (Fla. 2000) (strategic decisions are not considered ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decisions were reasonable under the norms of professional conduct). Furthermore, nothing in Strickland requires counsel to attack every aspect of a scientific procedure.

David Baer ("Baer"), a senior crime laboratory analyst in the DNA Section of FDLE at the Orlando crime laboratory, testified as an expert at trial. Counsel's challenge to Baer's qualifications to make a statistical comparison was overruled, Regarding Baer's testimony, the Florida supreme court stated on appeal:

> He indicated that he had been with FDLE for some nineteen years. He had begun doing DNA work in the laboratory upon its inception in 1991, and had continued to work there until the date of trial.
>
> Upon Baer's being tendered as an expert by the State, defense counsel objected on the basis that "this witness hasn't indicated any quail-fication in the area of statistical analysis."
>
> Baer stated that, although he did not "claim to be a statistician," he was "familiar with how statistics are used in this instance." He indicated that he relied on the expertise of other statisticians in reaching his expert opinion. However, he also indicated that he had been qualified to render an expert opinion in the area of statistical interpretation of DNA tests "just about any time I testify on DNA," having never been denied

expert qualification in that area.

Baer testified that he used the modified ceiling principal formula, which is a variation of the product rule recommended by the National Research Council in its 1992 Report. He acknowledged that there are "issues about the genetic variation between different populations," and to compensate for that, he did three calculations in Darling's case. Each calculation utilized a different database: one was based on African-American data, one was based on Caucasian data, and one was based on Southeastern Hispanics from the Miami area, where there are racial differences in DNA types. In Baer's opinion, use of the ceiling principal compensated for any differences within the major ethnic groups, which he stated are regard as "very insig-nificant," in any event.

Baer testified that "[t]here is no one formula for a sample size" for a DNA database. The Caucasian database used by Baer was one which he and FDLE had produced in the Orlando laboratory. He used the FBI's African-American and Hispanic databases. Baer testified that the formula used by FDLE when "we do the modified ceiling calculations. . . gives a ninety-five percent upper confidence level."

After conducting voir dire of Baer, defense counsel objected to "the witness being qualified to discuss analysis as an expert in that field." The trial judge found Baer qualified to testify as an expert in DNA analysis, stating (outside the presence of the jury):

> I find the witness is qualified to conduct laboratory analysis stipulated by both parties and qualified in the application of the statistical formulas developed by others. Although not a statistician himself, he is sufficiently trained and qualified to use those formulas much as a person might make certain calculations using algebraic formulas might not be qualified to testify as to the fundamental mathematics underlying development of those formulas. He's not required to be a statistician himself in order to use those formulas.

Baer then testified regarding the DNA examination which he had performed on Darling's blood and the vaginal swabs containing sperm. He stated that the test performed on the subject semen sample was one which had been used consistently for the past nine years. As a result of the testing, Baer concluded that the DNA from Darling's blood sample had both a strong and a weak band which matched the male fraction found on the vaginal swabs containing sperm from Grace's vagina. Baer explained that a statistical analysis was performed using the resultant data: "Once I determin[e] that a profile does match I'll then do a statistical interpretation of the profile to determine how common would this profile be in the general population." In this case, after finding ten independent genetic markers, Baer determined the frequency of each of them.

Baer stated that he had computed numbers that varied depending upon which of the different databases were used. Based upon the Caucasian database, and using the product rule with the plus or minus 1.735 bin window, Darling's DNA profile would have a frequency of about one out of 239 billion. Using the modified ceiling method, with "the larger match window," the match frequency would be "one out of ninety-nine billion Caucasians."

Applying the product rule with the plus or minus 1.735 bin window to the FBI's African-American population database, Darling's DNA profile would have a frequency of “one out of 104 billion” African-Americans. Using the modified ceiling method, with the "much larger match window," the match frequency would be one out 101 billion African-Americans.

Using the California Hispanic database, and the product rule with the plus or minus 1.735 bin window, Darling's DNA profile would have a frequency of "one out of 1.7 billion, eighty-one Hispanics." Using the modified ceiling method, with "the larger match window," the match frequency would be one out of 1.3 trillion Hispanics.

Next, Darling argues that the trial court abused its discretion in allowing Baer to testify as an expert in this case. Specifically, Darling claims that Baer, who was not a statistician, was not qualified to testify regarding the statistical analysis which was conducted, and argues further that,

because Darling is Bahamian, a Bahamian database (rather that the FBI's African-American population) should have been employed here. This Court, in its de novo review of a trial court's Frye determination (described by this Court in *Brim* as a question of law, 695 So. 2d at 274), may examine "'expert testimony, scientific and legal writings, and judicial opinions' to decide whether the scientific principles and procedures relied upon to create such evidence are generally accepted by a relevant scientific community both at the time of trial and today." *Brim v. State,* 779 So. 2d 427, 428 (Fla. 2d DCA 2000) (citing *Hadden v. State,* 690 So. 2d 573, 578 (Fla. 1997)).

Applying that test, Darling's challenges to the expert's qualifications and methodology lack merit. As we stated in *Brim,* "[i]n utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the *Frye* test must be established by a preponderance of the evidence." 695 Sol. 2d at 272 (alteration in original) (quoting *Ramirez v. State,* 651 So. 2d 1164, 1168 (Fla. 1995)).

Here the expert testified regarding the general acceptance in the scientific community of the methodology used, and demonstrated his knowledge and experience regarding

both the methodology and the databases employed. The fact that he was not, himself a statistician is not a sound basis to exclude his expert testimony regarding the statistical results. *Cf. Murray v. State,* 692 So. 2d 157, 164 (Fla. 1997) (observing that "it is not absolutely necessary for an expert witness to demonstrate practical experience in the field in which he will testify;" rather the expert must "demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources"); *Lomas v. State,* 727 So. 2d 376 (Fla. 5th DCA 1999 (rejecting a claim that the trial court erred in admitting DNA opinion evidence even though the State's expert witnesses did not personally compile the population statistics used in formulating their conclusions); see also *Fay v. Mincey,* 454 So. 2d 587, 595 (Fla. 2d DCA 1984) (observing that it is "well-established" that an expert does not need a special degree or certificate in order to be qualified as an expert witness in a specialized area," but "can be qualified by his 'experience, skill and independent study of a particular field"' (quoting *Salas v. State,* 246 So. 2d 621, 623 (Fla. 3d DCA 1971)).

Further, Darling's challenge to the expert's failure to use a Bahamian database (to the extent preserved) also lacks merit. In *Government of the Virgin Islands v. Penn,* 838 F. Supp 1054 (D. Vi. 1993), the court addressed a challenged to the FBI's assignment of bin frequencies derived from the black United States database to the DNA bands of the

defendant, a black man from St. Thomas. The defendant "claims that assigning bin frequencies derived from the United States blacks to the DNA profile of the defendant could have produced inaccurate probability calculations that were biased against the defendant." Id. at 1070. In analyzing this issue, the court considered a study entitled "VNTR Population Data, a Worldwide Study," a compilation of data reflecting bin frequencies on population "substructures" around the world. Id. The court noted that Dr. Bruce Budowle, the chief scientist at the FBI's DNA laboratory, had stated that the differences in bin frequencies "do not have forensically significant effects on VNTRs profile frequency estimates when subgroup reference databases from within a major population group are compared." Id. at 1071. Therefore, "the inference on the rarity of the profile would not change with the various estimates." Applying this to the case before it, the court observed that the "obvious implication is that even though a jury will not hear exactly how rare the defendant's DNA profile is in St. Thomas's black population, the jury can infer how rare the defendant's DNA profile would be in a database that reflects that population by hearing how rare the defendant's DNA profile is in the United States black database." It concluded, in light of this phenomenon, that any concern that the St. Thomas's black population's bin frequencies are drastically different from those of the United States black population is unwarranted. Though the application of the United States black bin

> frequencies to the defendant's bands does not produce the precise odds of finding a random match in the defendant's population, the danger of error in any such application is so small as to be practically nonexistent. Id. A similar logic applies in this case. Accordingly, the trial court did not err in admitting the DNA evidence here, or in allowing Baer to testify as an expert regarding the DNA testing, data, and resulting statistical analysis.

Darling, 808 So. 2d at 150-152,158-160 (footnotes omitted).

Prior to the evidentiary hearing, Defendant hired Arvizu[27] to review the available FDLE records relevant to the testing of the DNA sample in the instant case. Based on her reviews, Arvizu testified at the evidentiary hearing[28] that the procedures and methods utilized by FDLE fell well below accepted industry standards. She noted that FDLE had inadequate custody control procedures in place, failed to run the necessary controls to ensure against unreliable results and cross-contamination, and, at the time of testing, did not have a quality assurance program in place. (EH. 599-601, 604, 620.) Additionally, logbooks pertaining to instruments used in DNA testing and external proficiency results regarding the analysts were not provided and/or available, and the analysts' observations and testing notes were not compiled in a bound notebook pursuant to general laboratory practice. (EH. 612, 613, 616.)

> Fn.27. As stated previously, Arvizu is a quality assurance consultant with Consolidate Technical Services, Inc., who performs quality assurance audits and data quality assessments

of laboratories. (EH. 582, 592.)

Fn.28. During the course of the hearing, Defendant alleged a disclosure violation by FDLE. This Court then directed Arvizu to conduct further on-site investigation, during which she interviewed analyst Baer, and requested further specified documentation; some of the documentation was provided immediately and some was promised to be delivered in the near future. Arvizu testified based on her preliminary review of the new material, but asserted she needed time for further review and assessment. After additional information was provided to her via the Internet, (EH. May 3, 2004. 11.), her report was proffered by Defendant on May 21, 2004.

Baer testified at the evidentiary hearing that he had been with FDLE since 1979. (EH. 1093.) He further testified that he was given proficiency tests twice a year and had never failed one. (EH. 1084.) Baer stated that internal audits of FDLE are performed every year, while external audits are performed every two years; additionally the laboratory is audited every five years in order to maintain accreditation according to the guidelines of the American Society of Crime Laboratory Directors ("ASCLD") and the DNA Advisory Board. (EH. 1085, 1086, 1088.).[29] Baer addressed Arvizu's criticisms, and explained the techniques used by the FDLE laboratory in testing DNA samples. (EH. 1090-1092, 1104-1115, 1124-1126). Baer stated that two other laboratories tested Defendant's DNA sample and supported his findings. (EH. 1096.) Baer conducted elimination tests for Jesse Ruminski (the victim's boyfriend), as well

as Chris Powell and Jean Margus, who both lived in the victim's apartment complex and had information on the murder. (EH. 1116-1119.) He stated that he had no doubt that the DNA analysis performed in the instant case was done correctly. (EH. 1095, 1096.)

> Fn.29. The ASCLD conducts audits based on reviews of all the laboratories, procedures, documentation, case files, inspections, and analyst interviews. (EH. 1088.)

Although testimony from a quality assurance expert may have been admissible, see Murray, 838 So. 2d at 1082 (Fla. 2002) (relevant evidence can be admitted unless there is an indication of tampering), counsel had to make a decision as to whether that type of testimony, which would have gone to weight rather than admissibility of DNA evidence, was warranted. Arvizu is not a DNA expert. (EH. 656.) She admitted that she had only a "lay knowledge" of DNA techniques and was not qualified to question DNA results; accordingly, her assessment was limited to whether good laboratory protocol was followed. (EH. 656, 657, 1050.)

Based on the foregoing, there is no reasonable probability that testimony such as Arvizu's would have resulted in the exclusion, or even the undermining, of the DNA evidence adduced at trial. There was evidence at trial that FDLE had an accredited DNA laboratory. Furthermore, the Florida supreme court found Baer was well qualified to testify regarding DNA testing, data, and the resulting statistical analysis. And, counsel knew that Defendant's DNA would be present, based on Defendant's affair with the victim.[30] Accordingly, counsel made a strategic decision to launch a Frye challenge, based on the *statistical angle* of the DNA evidence, which resulted in

> the trial court's overruling of the challenge, followed by the lengthy discussion of the Florida supreme court, *supra,* upholding the trial court's decision.
>
> > Fn. 30 Defendant asserts that it appears from the testimony of counsel Francis Iennaco and Robert LeBlanc that because Iennaco held an undergraduate degree in zoology, neither he nor LeBlanc felt it was necessary to hire an expert to investigate whether FDLE's quality assurance program adequately ensured the reliability of the DNA testing and results. (EH. 836-837) This, however, is a misstatement. Counsel's request for a DNA expert was granted by the trial court. (EH. 852.) However, after Defendant advised counsel that he had had an ongoing affair with the victim, and there was no question his DNA would be present, the expert was not hired. (R. 852, 953, 921,922). See Darling 808 So. 2d at 155, n.10.
>
> Based on the foregoing, Defendant's claim is denied.

(PCR1820-1828).

The Aexpert@ hired by Darling was not an expert in DNA, but was a quality assurance expert. Ms. Arvizu admitted she was not a DNA expert and only had lay knowlege of DNA techniques. Her assessment was limited to whether good lab practices were followed. Ms. Arvizu also conceded she was not qualified to question the DNA results. Darling=s trial attorneys requested a DNA expert but did not pursue the issue after Darling advised

them he had an affair with the victim and there was no question his DNA would be present,

The testimony of David Baer, the senior crime lab analyst at FDLE Orlando who had been with FDLE since 1979 showed that neither he nor the FDLE lab were deficient. Mr. Baer was tested two times a year with proficiency tests and had never failed. Internal audits of FDLE are performed each year; external audits every two years. The FDLE lab is accredited and is audited every five years in order to maintain accreditation. The Orlando lab was accredited in 1995 and re-accredited in 2000 according to the guidelines of the American Society of Crime Laboratory Directors (AASCLD@)and the DNA Advisory Board. The ASCLD audit includes a review of all the labs, procedures, documentation, case file review, inspection and interviews of analysts. Mr. Baer addressed Ms. Arvizu=s criticisms and explained the techniques used in the FDLE lab. He had no doubt the DNA analysis performed in Darling=s case was done correctly. In fact, Mr. Baer had entered Darling=s DNA into CODIS and two other labs showed the same result: one in Broward and one in Tallahassee.

Trial counsel made a reasonable strategic decision regarding how to approach the DNA. In *Strickland*, the Supreme Court stated that "strategic choices made after thorough investigation of law

and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690, 104 S.Ct. 2052. *See also Wiggins v. Smith*, 539 U.S. 510, (2003) (stating that "the deference owed such strategic judgments" under Strickland is defined "in terms of the adequacy of the investigations supporting those judgments").

The admissibility of DNA evidence has been recognized since 1988. *See Andrews v. State*, 533 So. 2d 841 (Fla. 5th DCA 1988). Testimony from a quality assurance expert may or may not have been admissible. In any case, counsel would have had to make a decision whether that type of inconclusive testimony, which would go to weight rather than admissibility of DNA, was worth the $7,000 fee.[20] Trial counsel attacked the DNA statistics with an argument which inspired a lengthy discussion in *Darling v. State,* 808 So. 2d 145, 150-152, 158-160 (Fla. 2002). Nothing in *Strickland* requires counsel to attack every aspect of a scientific procedure, especially when the challenge is non-productive. As this Court recently stated in *Ferrell v. State*, 30 Fla. L. Weekly S863, 865 (Fla. Dec. 22, 2005):

> Although trial counsel could have hired more experts and brought in more witnesses, the

[20]Ms. Arvizu testified she spent 44 hours up to the time of hearing and charges $150/hour. She spent additional time after the hearing reviewing documents and submitting an additional report.

> standard for assessing ineffective assistance claims "is not how present counsel would have proceeded, in hindsight, but rather whether there was *both* a deficient performance and a reasonable *probability* of a different result. *Brown v. State,* 846 So. 2d 1114, 1121 (Fla. 2003)(quoting *Cherry v. State*, 659 So. 2d 1069, 1073 (Fla. 1995)); *See also Strickland*, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way.").

Ms. Arvizu was not a DNA expert and could not give an opinion on the validity of the results. In fact, Darling did not re-test the DNA or show that the results were affected by any shortcoming at FDLE. This claim fails for lack of proof that the results were not accurate.

FDLE was accredited and, as the Florida Supreme Court noted, Mr. Baer was well-qualified. Further, as Ms. Arvizu noted, she did not know of any attacks on the basis of quality assurance before 2000 (EH 1056). Therefore, it is questionable whether, even if this testimony had been admissible, Ms. Arvizu's testimony was available. *See Ferrell v. State*, 30 Fla. L. Weekly S863, 865 (Fla. Dec. 22, 2005); *Nelson v. State*, 875 So. 2d 579, 583 (Fla. 2004).

Darling faults trial counsel for failing to launch this new and innovative method of attacking DNA results; however, nothing in *Strickland* requires trial counsel to attempt a novel approach at

the expense of a client. Mr. Baer testified he did not know of such a defense practice.

CLAIM VI

COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO HIRE A FINGERPRINT EXPERT; THIS ISSUE WAS ABANDONED AT THE TRIAL LEVEL

This claim was abandoned at the trial level. The trial court held:

> **Claim III: Mr. Darling is denied his rights under the sixth and fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution because defense counsel was ineffective for failing to object to the entry of a photograph of a latent fingerprint allegedly obtained from a lotion bottle located at the crime scene and/or failing to hire and present an independent fingerprint expert.**
>
> Defendant claims that the primary evidence against him included testimony that a lotion bottle found in the victim's apartment contained one thumb print matching his. He further claims that counsel was ineffective for failing to object to entry of the photograph of his fingerprint into evidence based on the "best evidence rule."[6] Defendant asserts that if an objection had been lodged, the photograph would have been inadmissible, thus seriously undermining the State's case.
>
> Fn.6. See §90.952, Fla. Stat. (best evidence rule requires that if the original evidence or a statutorily authorized alternative is available, no evidence should be received which is merely substitutionary in nature).

Photographs are properly admissible if they depict factual conditions relating to the crime and if they are relevant in that they aid the court and the jury in finding the truth. See Booker v. State, 397 So. 2d 910, 914 (Fla. 1981).

At trial, the lotion bottle was identified by the law enforcement officer who found it in the sink of the victim's bathroom. (TT. 398) The bottle was then entered into evidence. (TT. 398.) Using a test procedure identified by the chemist as "reflected ultra violent [sic] imaging," a print was raised on the bottle. (TT. 501-504.) After a photograph was made of the print as it existed on the bottle; the photograph was offered into evidence at trial. (TT. 501-504.) Based on the foregoing, the photograph was used in connection with testimony regarding fingerprint analysis and comparison, thus making it relevant and admissible. Id. Accordingly, Defendant's claim is denied.

Defendant also asserts that counsel was ineffective for failing to hire an independent expert to challenge the trial testimony presented by Tony Moss ("Moss"), the State's fingerprint expert.

Prior to the evidentiary hearing, Defendant hired expert Smith to conduct a fingerprint examination. In his pre-hearing deposition,[7] Smith opined that it was inconclusive whether the fingerprint located on the lotion bottle matched that of Defendant. (Smith. 7-9.) He further opined that he was unable to conduct a thorough examination without having access to a reversal print of the fingerprint. (Smith. 12.) As stated previously, on May 5, 2004, Smith was provided with the negatives he needed. When the hearing reconvened on May 7, 2004, however, Defendant's counsel stated that he was not going to proceed with further testimony about the fingerprint evidence.

(EH. May 7, 2004.2.) The Court replied, “I don't know that you have to say anymore. We have the deposition in evidence. I've read it. And, basically, his opinion was inconclusive. He was not in a position to say anything one way or another." (EH. May 7, 2004. 2.) Defendant's counsel agreed that was a fair representation of his statement. (EH. May 7, 2004.2.)

> Fn.7. Smith was deposed on April 2, 2004, and the deposition was entered into evidence at the evidentiary hearing. (EH. 665-666.)

Defendant asserts that Smith's deposition testimony could have refuted Moss' trial testimony, because at trial, Moss stated that the match was overwhelming, with over 20 points of identification. (EH. 922.) However, at the evidentiary hearing, Moss stated he saw 15 points of identification. (EH. 992.) Defendant argues that he would have been acquitted had the jury heard the testimony of a fingerprint expert such as Smith.

Defendant's claims are without merit. Smith stated in his deposition that he was unable to conduct an examination without seeing a reversal print. Once he received and reviewed the information he sought, collateral counsel presented no further testimony from him. Accordingly, there was no testimony that refuted Moss' trial and/or evidentiary hearing testimony.

Furthermore, Defendant fails to acknowledge Moss's hearing testimony that he *could quickly identify 15 points* of comparison between the print on the lotion bottle, and Defendant's thumb print, *and if the Court so desired, could use the enlarging machine to identify all 20 points of comparison*. (EH. 993, 996).[8]

> Fn.8. Moss brought the enlarging

machine to the evidentiary hearing.

> Based on the foregoing, Defendant's claims are merely conclusory allegations which do not merit relief See Wooden, 589 So. 2d at 372. See also Flint 561 So. 2d at 1344.

(PCR1795-1798). Mervin Smith was present at the evidentiary hearing and was provided the fingerprint evidence he needed to make a determination. After all the photographs and negatives were provided to Mr. Smith, defense counsel advised the court they were not presenting his testimony. As in *Ferrell v. State*, 30 Fla. L. Weekly S863 (Fla. Dec. 22, 2005), this claim was abandoned. This Court stated in *Ferrell*:

> Ferrell's claim of ineffective assistance based on the failure of trial counsel to seek the expert assistance of a social worker is a fact-based issue that required development at an evidentiary hearing, as evidenced by postconviction counsel's proffer of testimony from the expert social workers. *See Owen v. State*, 773 So. 2d 510, 515 (Fla. 2000). However, Ferrell "opted to forego" the presentation of such evidence at the scheduled evidentiary hearing and thus waived the claim. Id.

Ferrell v. State, 30 Fla. L. Weekly at 866. The State submits that this claim was raised in bad faith both at the trial level and on appeal. Mr. Smith was available to testify and had been present at the hearing for several days. Yet when the evidence was obviously adverse to Darling, collateral counsel requested to submit a deposition in lieu of Mr. Smith's testimony. The

deposition was received over State objection. The deposition is hearsay and inadmissible. As the trial court ruled, the deposition does not support this claim even if it were properly admitted. However, the tactic of trying to mislead the court by trying to use a deposition in lieu of the expert's obviously adverse testimony, then mis-quoting the testimony of the State expert, Tony Moss, should not be tolerated. This claim was abandoned, it has no merit, and it should be denied.

CLAIM VII

CLAIMS OF IMPROPER PROSECUTORIAL ARGUMENT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL; RAISING THE CLAIM AS INEFFECTIVE ASSISTANCE OF COUNSEL WILL NOT AVOID THE PROCEDURAL BAR.

In this claim, Darling argues the prosecutor's argument was inappropriate and counsel was ineffective for failing to object. He also argues the trial judge included a section in the sentencing order which misstates applicable law. Claims involving prosecutorial argument or the sentencing order should have been raised on direct appeal and are procedurally barred. Darling is attempting to relitigate the merits of this issue by couching it in terms of an ineffective assistance of counsel claim. *See Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990) (stating that claims of ineffective assistance of counsel should not be used to circumvent the rule that postconviction proceedings cannot serve

as a second appeal); *Shere v. State*, 742 So. 2d 215, 223 (Fla. 1999).

The *Lockett* claim was raised at the trial level as Claim VI, and referred primarily to jury instructions. (PCR1290-1292). The issue on appeal is solely that the prosecutor's comments and the sentencing order were erroneous. The trial judge summarily denied this claim as follows:

> Claim VI alleges facts already contained in the case record. Therefore, summary disposal of Claim VI is appropriate because it is not based upon disputed facts.
>
> The passage which defendant sets out on page 45 of his Motion to Vacate records an entirely appropriate comment by the prosecutor. The prosecutor did not argue that the jury was precluded from considering mitigation. The prosecutor merely characterized the mitigation which defendant had presented, and pointed out that it had little, if any, direct relation to the crime. This was appropriate because the jury can consider whether a mitigating factor is "any other circumstance of the offense." *See* Standard Jury Instruction 7.11. The Court specifically instructed the jury that they could consider "any other circumstance of the offense" as a mitigating factor. (TR 295) Defendant essentially concedes that the purpose of the prosecutors argument was to persuade the jury to give the proposed mitigating factor little weight because it had little causal connection with the brutal rape and murder Defendant perpetrated upon Grazyna Mlynarczyk. This has been approved by the Florida Supreme Court as a valid consideration in determining the weight to be given to a mitigating circumstance. *See Spencer v. State*, 691 So.3d 1062, 1064 (Fla.

> 1996). Clearly, it is proper for a sentencing fact finder to evaluate proposed capital mitigation in light of both the killing, and of the facts leading up to the killing.

(PCR1537-1538). As the trial court found, this claim has no merit. Darling's complaints are actually with the state of the law, not that the prosecutor or trial judge violated the law. The claim has no merit.

CLAIM VIII

CLAIMS THE JURY RECEIVED ERRONEOUS INSTRUCTIONS SHOULD HAVE BEEN RAISED ON DIRECT APPEAL; RAISING THE CLAIM AS INEFFECTIVE ASSISTANCE OF COUNSEL WILL NOT AVOID THE PROCEDURAL BAR.

As in Claim VII, Darling's grievances with the present jury instruction and state of the law should have been raised on direct appeal. Raising the claims as ineffective assistance will neither avoid the procedural bar nor require relief since the claim has no merit. The trial court found:

> Claim VII alleges facts already contained in the case record. Therefore, summary disposal of Claim VI is appropriate because it is not based upon disputed facts.
>
> This Court finds as a matter of fact that the transcript of the guilt phase *voir dire* does not indicate that the prosecutor in his *voir dire* questioning made statements which differed materially from the jury instructions which were ultimately given by the court.
>
> Moreover, the said transcript also indicates that defense counsel did object to the prosecutor's characterization of the jurors' proper role in the penalty phase process, (TT 98) and that the court immediately thereafter instruction the jury as to the procedure by which a penalty phase jury determines what sentence to recommend and that their decision would be given great weight by the court. (TT96-7) Indeed, defendant himself concedes at page 47 of his Motion to Vacate, that the prosecutor's questions were designed to fit "hand in glove" with the standard jury instructions which were ultimately given. A valid burden-shifting argument cannot be

> founded on the standard jury instructions as to mitigation and aggravation. *See State v. Marquard*, 850 So. 2d 417, 433, n.18 (Fla. 2002); *State v. Vining*, 827 So. 2d 201, 213 (Fla. 2002).
>
> This Court also finds that defense counsel was not ineffective for failing to further object to the prosecutor's *voir dire* statements and questions regarding mitigation and aggravation. If, as Defendant concedes, the prosecutor's comments were "hand in glove" with the standard jury instructions, defense counsel did not have a valid basis for further objection.
>
> Lastly, because the defense did object to the prosecutor's characterization of aggravation and mitigation, Claim VII is procedurally barred because it could and should have been raised on direct appeal. *See Moore v. State*, 820 So. 2d 199, 208 n.10 (Fla. 2002)(claim seeking to raise prejudicial remarks of prosecutor were procedurally barred because it should have been raised on direct appeal); *Marquard v. State*, 850 So. 2d, 417, 423 nn.1, 2 (Fla. 2002)(Defendant's Claim 6, that defense counsel failed to object to improper comments by the prosecutor which diminished the role of the jury, was procedurally barred because it should have been raised on direct appeal).

(PCR 1539-40). The trial court order is supported by the record.

CLAIMS IX AND X

CLAIMS RAISED TO PRESERVE THEM FOR REVIEW.

Darling raises claims pursuant to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and *Ring v. Arizona*, 536 U.S. 584 (2002), to preserve them for review. (Initial Brief at 93) The *Caldwell*

claim is procedurally barred for failure to raise it on direct appeal. The *Ring* claim is repeatedly denied by this Court and Darling's aggravating circumstances included the prior-violent-felony aggravator and the during-a-felony (sexual battery) aggravator.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee respectfully requests this Honorable Court affirm the order of the trial court and deny all relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to David Hendry and Mark Gruber, CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619, this _____ day of January, 2006.

Assistant Attorney General

CERTIFICATE OF FONT

I hereby certify that a true and correct copy of the foregoing Answer Brief was generated in Courier New, 12 point font, pursuant to Fla. R. App. 9.210.

Assistant Attorney General