IN THE SUPREME COURT OF FLORIDA

JASON DEMETRIUS STEPHENS,

Appellant,

v. CASE NO. SC05-1301

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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I. PRELIMINARY STATEMENT

Appellant, JASON DEMETRIUS STEPHENS raises five issues in this appeal from the denial of his motion for post-conviction relief. References to the appellant will be to "Stephens" or "Appellant". References to the appellee will be to the "State" or "Appellee". References from Stephens' direct appeal will be referred to as "TR" followed by the appropriate volume and page number. The two-volume record on appeal in the instant case will be referenced as "PCR" followed by the appropriate volume number and page number. The one-volume supplemental record on appeal will be referred to as "PCR-Supp" followed by the appropriate page number.

The two volume transcript of testimony presented at the evidentiary hearing will be to "PCR-T" followed by the appropriate volume and page number. References to Stephens' initial brief will be to "IB" followed by the appropriate page number.

II. STATEMENT OF THE CASE AND FACTS

Jason Stephens, born on March 8, 1974, was 23 years old when he murdered three-year-old Robert Sparrow III. The relevant facts surrounding the murder were cited by the Florida Supreme Court on direct appeal:

> ... The overwhelming evidence of guilt in this case shows Stephens broke into Robert Sparrow, Jr.'s house on June 2, 1997, at approximately 2 p.m., while a

number of people were present. He robbed the people there and kidnapped a child. There were three or four other people with Stephens at the time he committed these crimes. However, Stephens refused to cooperate with the authorities in their efforts to identify the other individuals. One of the individuals, Horace Cummings (Cummings), turned himself into the police and was tried with Stephens. The other two individuals were never apprehended. Stephens testified at trial that Cummings and the other unidentified individuals went to the house to buy drugs and were unaware of his plan to rob the occupants.

While some of the details of the eyewitness' accounts varied, they all substantially agreed with the following summary of events. Stephens entered the house first, carrying a nine millimeter automatic gun. He was standing next to Robert Sparrow, III (Sparrow III), who was three years and four months old. Upon seeing the gun, the child's mother, Consuelo Brown, physically confronted Stephens. Stephens hit her with the gun on the bridge of her nose. Ms. Brown fell to the ground and her nose began to bleed. Stephens ejected a bullet onto the floor and informed the occupants that the gun was loaded. He told them that he wanted "money and weed." He demanded from Robert Sparrow, Jr. (Sparrow Jr.) the keys to a blue car located outside the house. Sparrow Jr. told Stephens the keys were with someone who was not present at the house.

Thereafter, two other individuals entered the house. One of the individuals was Cummings, but the other individual was never identified. Stephens made all the occupants lie down on the floor as he searched their pockets for valuables. The unidentified individual, referred to as Plats or Dreds because of the way he wore his hair, held the occupants of the house on the floor at gunpoint while Stephens located a secured room where he could put them. There was some testimony that Sparrow III said he was being choked, but it was unclear from the record who was choking him. After inspecting the house, Stephens determined the bathroom was the most secure location to put his hostages, and he ordered six of them, including six-year-old Kahari

Graham, to crawl to the bathroom. Sparrow III was kept separate from the others.

Many of the eyewitnesses testified that Stephens showed his ID and said he was taking Sparrow III with him as insurance. Sparrow Jr. testified Stephens agreed he would leave the child at the corner if he was not followed. Stephens also testified he agreed to leave the child somewhere, but he did not know what location the child's father had referred to in his testimony.

After the occupants had been secured in the bathroom, Sparrow Jr.'s half-brother, David Cobb (Cobb), and his friend, Roderick Gardner (Gardner), arrived at the house. Upon entry, they too were robbed and forced to crawl to the bathroom. One of the items Stephens took from Gardner was his car keys. Gardner was driving his mother's dark green Kia, which had roll-down windows and pull-up locks. There was testimony that Sparrow III had ridden in the Kia the day before he was killed. On that day, he had been scolded for rolling down the windows and trying to open the car door while it was moving. The record did not reflect that Stephens had any way of knowing whether the child was capable of rolling down the windows or opening the car door.

When Stephens exited the house with the child, the other individuals who Stephens testified had only gone to the house to buy drugs, were seated in the black car they had driven to the scene. Stephens testified the other individuals waved him away from the black car because he had the child. Stephens then ordered the boy to get into the Kia. Both cars pulled away from the house, with the Kia following the black car. After driving eight tenths of a mile, both cars pulled over in a residential neighborhood. It was approximately 2:30 p.m. The Kia was parked on the side of the street without the benefit of any shade. The outside temperature was approximately 82 degrees and sunny. The windows in the car were rolled up and all of the doors were closed. At 9:25 p.m., the dark green Kia was found. Sparrow III was dead, his body lying face down in the passenger's seat with his feet angled

toward the steering wheel. The State argued Stephens suffocated Sparrow III before leaving the car. Stephens testified the boy was alive when he left him in the car.

The medical examiner, Bonifacio Floro, M.D., testified that in his expert medical opinion Robert Sparrow, III had probably died of asphyxiation. However, he could not conclusively rule out hyperthermia as the cause of death. He primarily relied upon multiple "petechiae" in the face and eye lining as an indication of asphyxiation. He also noted there was a small four-millimeter scratch on the back of the child's neck. Dr. Floro concluded this scratch was probably caused by a fingernail. Dr. Floro testified the child's lower lip was bruised, indicating he had been suffocated. Dr. Floro also relied upon the lack of fingerprints or other evidence showing the child tried to roll down the window or open the door in concluding it was more likely that Sparrow III died from asphyxiation than hyperthermia.

Steven Frank Dunton, M.D., testified on the defendant's behalf. After reviewing Dr. Floro's report, he concluded Sparrow III died from hyperthermia. Dr. Dunton relied upon the fact that there were very few signs of asphyxiation. However, he did admit asphyxiation can never be conclusively ruled out because it can leave no signs at autopsy. Dr. Dunton admitted hyperthermia by itself should not cause petechiae, whereas asphyxiation could. However, he went on to explain that gravity will pull the blood down to the lowest point of the body when the heart stops pumping, causing the blood to pool to such a degree that venules rupture resulting in petechiae. He attributed the discoloration of the child's lips to the tissues drying out after death. Therefore, he concluded Dr. Floro erred in relying on the petechiae to diagnose the child's death as being caused by asphyxiation.

Stephens v. State, 787 So.2d 747 (Fla. 2001).

Prior to trial on the merits, Stephens entered a plea to eight counts of the same indictment that charged Stephens with the murder of Robert Sparrow III. (TR Vol I, 8-11).

Stephens pled not guilty and went to trial on three counts of armed robbery (of Consuelo Brown, Tracey Williams, and Kahari Graham) and one count of first degree murder. Stephens was represented at trial by Mr. Richard Nichols and Mr. Refik Eler. Mr. Nichols had primary responsibility for the guilt phase. Mr. Eler had primary responsibility for the penalty phase. Mr. Nichols is now deceased.

At the time of trial, Mr. Eler had been a member of the Florida bar for over eleven years. (PCR-T Vol. II 188). His practice is for the most part criminal law and all trial litigation. (PCR-T Vol. II 188). Mr. Eler handled homicides for the entire time he has been a member of the Florida Bar. He has defended a dozen capital cases and tried well over a 100, perhaps close to 200, jury trials as both a prosecutor and defense counsel. (PCR-T Vol. II 190-191).

On December 18, 1997, the jury convicted Stephens of first degree murder on a general verdict form. (TR. Vol II 296). The jury also convicted Stephens of the armed robbery of Kahari Graham. The jury acquitted Stephens of the armed robbery of

Consuelo Brown and Tracey Williams. (TR. Vol II 297-299). The penalty phase was conducted on January 15, 1998.

In aggravation, the State offered evidence of a 1992 burglary conviction and evidence of Stephens' contemporaneous convictions against the other victims in the house at the time Stephens took little Rob from his home. Mr. Eler objected to the admission of the 1992 burglary conviction as a prior violent felony conviction. (TR. Vol IV. 587-588).

In order to demonstrate the 1992 burglary conviction qualified as a prior violent felony, the State presented the testimony of the then 16-year-old victim, LaTonya Jackson. Ms. Jackson testified she awoke to hear three men walking around her father's house. One of the group, Sammie Washington, was the father of her one-year-old child. According to Ms. Jackson, two of the men, including Stephens, had a gun. Stephens had a sawed off shotgun and Sammie had a handgun.

She told the jury she saw Stephens jiggling the sliding glass door to her home. All of the three eventually got inside. None had been invited to enter. Ms. Jackson testified as she tried to get out of the house, the men who had entered her home chased her outside. Ms. Jackson testified Stephens threw her up against a car and held her there. Stephens held a gun to her

head and said he wanted to kill her. Ms. Jackson testified she did not know Stephens prior to this incident. (TR. Vol IV 591-596). The Court overruled the defense's objection to the use of this conviction as a prior violent felony aggravator. (TR Vol. IV 589-590).

The State also offered victim impact evidence through the live testimony of Consuelo Brown, who was allowed to read a statement to the jury and a letter written by the victim's grandparents. Trial counsel objected to this evidence as improper victim impact evidence. (TR Vol. IV 580-584). The trial court overruled the objection but instructed the jury it could not consider the victim impact evidence in aggravation, nor could it weigh it as an aggravating circumstance when determining whether to recommend life or death. (TR Vol. IV 581, 584, and 598).

In mitigation, Stephens presented ten witnesses and testified on his own behalf. The jury recommended death by a nine to three vote. Stephens v. State, 787 So.2d 747, 752 (Fla. 2001). The trial court found three aggravating circumstances; prior violent felonies; murder during the commission of a felony; and the age of the victim, all of which were given great weight. (TR Vol. II 389). The trial court found no statutory

mitigating circumstances had been established but found and gave weight to eleven nonstatutory factors. The trial judge followed the recommendation of the jury and sentenced Stephens to death for the first degree murder of Robert Sparrow III.

Stephens raised eleven issues on direct appeal. This Court rejected his arguments and affirmed his convictions and sentence to death. Stephens v. State, 787 So.2d 747, 762 (Fla. 2001).

On October 23, 2002, Stephens filed a motion for post-conviction relief raising eighteen claims and the State filed a response. After a Huff hearing, the collateral court granted Stephens an evidentiary hearing on seven claims.

On August 4, 2004, Stephens filed an amended and supplemented motion to vacate judgment of conviction and sentence with special request for leave to amend. Stephens re-pled the claims initially presented in his initial motion for post-conviction relief and raised a nineteenth claim alleging a Crawford error. (PCR Vol. I 73-74).

On August 25 and 26, 2004, the collateral court held an evidentiary hearing on the seven claims upon which the court granted a hearing. On April 29, 2005, the collateral court denied all of Stephens' claims. (PCR Vol. II 252-284).

III. SUMMARY OF THE ARGUMENT

Issue I: Stephens failed to show counsel was ineffective during the penalty phase of Stephens' capital trial. Trial counsel presented mitigation evidence consistent with the Stephens' theory of the case. Additionally, trial counsel consulted with two mental health experts both of whom formed opinions detrimental to Stephens' approach to the penalty phase. Trial counsel is not ineffective for failing to present the testimony of mental health experts whose testimony will open the door to evidence inconsistent with trial counsel's theory of defense.

Likewise, though Stephens presented the testimony of another mental health expert at the evidentiary hearing, trial counsel is not ineffective simply because, years later, a defendant is able to produce a mental health expert who will testify more favorably than the experts originally consulted by trial counsel. Finally, Stephens put on no credible evidence that trial counsel was ineffective for failing to challenge or neutralize Stephens' previous conviction for burglary, that trial counsel improperly conceded aggravators not found by the trial court, or improperly conceded Stephens guilt to first degree murder.

Issue II: Stephens failed to establish trial counsel was ineffective during the guilt phase of Stephens' capital trial. Stephens put on no evidence trial counsel's failure to attend several depositions had any impact on trial counsel's performance at trial. Likewise, Stephens failed to show, or even allege, that had trial counsel argued his motion for a judgment of acquittal, for a new trial and for a change of venue more vigorously, the motions likely would have been granted. Absent such a showing, Stephens cannot show trial counsel was ineffective.

Stephens also failed to establish that trial counsel conceded Stephens' guilt without his consent or that Stephens' guilty pleas, in the face of overwhelming evidence, were not the product of reasoned trial strategy. Stephens also failed to show trial counsel was ineffective for failing to object to the prosecutor's statements during closing arguments because none of the statements were objectionable. Even if this were not the case, none of the statements, either alone or cumulatively, acted to deprive Stephens of a fair trial. Finally, Stephens failed to show that trial counsel was ineffective for delegating his own responsibilities to counsel for the co-defendant.

Issue III: Stephens failed to demonstrate that trial counsel was operating under a conflict of interest. Trial counsel, Refik Eler, did not recall, at the time of trial, he had previously represented Stephens' co-defendant, Sammie Washington on a 1992 burglary charge that also involved Jason Stephens. Stephens' conviction for the burglary was introduced into evidence by the State during the penalty phase of Stephens' capital trial.

Stephens failed to demonstrate any nexus between Mr. Eler's representation of Sammie Washington and his performance at trial. While Stephens claimed this conflict of interest prevented Mr. Eler from calling Washington to mitigate Stephens' 1992 conviction or to take an adversarial position to Mr. Washington for the benefit of his client, Stephens failed to call Washington at the hearing or to put on any evidence in support of this claim.

Issue IV: Trial counsel was not ineffective for failing to pursue a jury interview after the jury foreman gave a statement to the press indicating the jury did not believe Stephens intended to kill Little Rob. Had trial counsel pursued such a motion, it would have been denied because the foreman's statement involved matters that inured to the verdict and which could not have been the subject of a jury inquiry.

Issue V: Trial counsel cannot be ineffective for failing to challenge the judge's decision to instruct the jury on both the HAC and pecuniary gain aggravators. Trial counsel cannot be ineffective for failing to object when he actually did object. Even if this were not the case, there was ample evidence adduced at trial to support both the HAC and pecuniary gain instruction. Trial counsel cannot be deemed ineffective for failing to raise a meritless claim.

IV. ARGUMENT

ISSUE ONE

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF STEPHENS' CAPITAL TRIAL

In presenting his claim of ineffective assistance of penalty phase counsel, Stephens alleges trial counsel was ineffective for failing to present available evidence in mitigation. Stephens also faults penalty phase trial counsel for failing to present evidence to challenge or neutralize Stephens' prior violent felony conviction for burglary, failing to object to certain portions of the prosecutor's closing arguments, conceding aggravators not found by the trial court, and conceding aggravators through Stephens' pleas of guilty. [1]

[1] This Court has on many occasions set forth the defendant's burden of proof upon the presentation of allegations of

A. Failure to present mitigating evidence

During the penalty phase of Stephens' capital trial, Stephens called ten lay mitigation witnesses. Trial counsel first called, Delena Stephens, Jason Stephens' mother. Ms. Stephens testified she was employed as the Director of the Office of Justice and Peace at St. Augustine Catholic Church. Stephens was one of five siblings. (TR Vol. IV 605).

Stephens' father worked for UPS. (TR Vol. IV 606). He died in 1996 on Stephens' 22d birthday. (TR Vol. IV 612). Stephens loved and missed his Dad as they were close. (TR Vol. IV 612). Ms. Stephens described Stephens and his father's unique bond; a bond that formed because both father and son were so good with their hands. Stephens and his father built things together. Stephens even took up welding, modeling his father. (TR Vol. IV 608). Ms. Stephens told the jury the whole family worked on making the dining room table and furniture for the house. (TR Vol. IV 608). The family played together. Stephens' father went to Stephens' ball games, went to church with him, took him camping, and went with his sone to the movies, dinner, and the park. They went on family vacations. (TR Vol. IV 607). Stephens did chores at home and had a good relationship with his siblings. (TR Vol. IV 606-607). Stephens played baseball as a

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ineffective assistance of counsel. *See e.g.* Hannon v. State,

child, was a Boy Scout and played the guitar. (TR Vo. IV 610). Stephens went to church regularly and was not a major disciplinary problem at home. (TR Vol. IV 610-611).

Through Ms. Stephens, trial counsel admitted a series of Stephens' childhood photos starting when he was a toddler, including one taken in his father's UPS truck and another with some other children. He also introduced a poem and essay that Stephens wrote and a certificate he received for completing welding classes. (TR Vol. IV 614-615,619-21). Ms. Stephens read the poem and essay to the jury. (TR Vol. IV 621-622). Trial counsel also introduced a family photo from one of the Stephens' children's birthday and from a Christmas gathering. (TR Vol. IV 615). Mrs. Stephens told the jury the family celebrated every Christmas, New Years, Memorial Day, birthdays, you name it. (TR Vol. IV 615).

Ms. Stephens described her son as very sensitive, playful, and bright. (TR Vol. IV 617). She said he was, in a lot of ways, like his Dad. (TR Vol. IV 617).

According to his mother, Stephens worked as a teen both at Burger King, and at a nursing home. (TR Vol. IV 618). She told the jury that Stephens loved children and children loved him. (TR Vol. IV 618). Ms. Stephens testified Stephens also worked

as a photographer at a shopping center and volunteered at the annual church bazaar. (TR Vol. IV 619). She testified that Stephens always had a sincere desire to help out. (TR Vol. IV 619) Ms. Stephens told the jury her son expressed sorrow and remorse at what had happened to the child and asked the jury to recommend life in prison. (TR Vol. IV 623).

Angela Stephens told the jury her brother got along with everyone, was never violent, and liked little kids. (TR Vol. IV 626). She described him as her savior when he babysat for her colicky child. (TR Vol. IV 626). She never saw Stephens use drugs or alcohol. (TR Vol. IV 627). In her view, Stephens was a protector for the underdog and always looked out for his family. (TR Vol. IV 630).

David Stephens testified that his brother was funny guy, cheerful, and brought excitement to the family. (TR Vol. IV 632). He described Jason as “loving”. (TR Vol. IV 632). He never knew Stephens to use drugs or alcohol. (TR Vol. IV 632). When asked what other factors he would like the jury to know about Jason, David said he was a loving brother and not the monster the media portrayed him to be. (TR Vol. IV 630).

Trial counsel next called Michelle Grant to testify before the jury. Michelle Grant testified that she knew Stephens when

he was a student. (TR Vol. IV 633). Stephens worked with her at an after-school day care center at the church for a week or two. (TR Vol. IV 636). In Miss Grant's view, Stephens was good with the kids. He was not a threat to the kids and played with them.(TR Vol. IV 637). She never saw him lose his temper or hit them. (TR Vol. IV 637). She thought he was a sincere person and had a strong faith in God. (TR Vol. IV 637-638).

Mr. Eler next called Lyn Rayo to testify. (TR Vol. IV 638). Ms. Lyn Rayo testified that she worked for the Volunteers of America as a supervisor of housing programs for the homeless and the mentally ill. Ms. Rayo knew Stephens through his mom. (TR Vol. IV 639). Her family and the Stephens family celebrated holidays and birthdays together. Her family spent a lot of time with the Stephens family, even going camping with them. (TR Vol. IV 639-640). Ms. Rayo loved Ms. Stephens and her family. (TR Vol. IV 640).

Ms. Rayo remembered that Stephens was really good with kids. (TR Vol. IV 640). Ms. Rayo never had concerns about her kids interacting with Stephens and never saw him use drugs or alcohol. (TR Vol. IV 641). She saw him working at his job at the mall taking pictures and observed that he interacted well with the kids. (TR Vol. IV 641). According to Ms. Rayo, the

Stephens family was child oriented. (TR Vol. IV 642). She thinks Stephens is very bright and talented and these traits would allow him to be a good prisoner. She sees lots of potential in Jason Stephens. (TR Vol. IV 642).

Trial counsel next called Ms. Sylvia James. (TR Vol. IV 643). Ms. James was Stephens' first grade teacher. (TR Vol. IV 644). She first met him before he started kindergarten. (TR Vol. IV 644).

She told the jury that Stephens was a helpful child who was a slightly above average student. (TR Vol. IV 645). Even after she was no longer his teacher, Stephens would come to her house and volunteer to help her in the yard. (TR Vol. IV 646). Stephens visited her family and played with her grandchildren. (TR Vol. IV 646).

Ms. James saw him interact with children and thought he was good with the kids. Ms. James had not seen Stephens recently but as a teen he cleaned her room at church before he went to work.(TR Vol. IV 646). She told the jury that Stephens was always willing to volunteer to pitch in when help was needed and was an altar boy and usher at church. (TR Vol. IV 647). She also testified that Stephens served as a photographer for the church’s Christmas breakfast and took pictures of the children

with Santa Claus. (TR Vol. IV 647). He volunteered to work with the basketball teams during the annual church bazaar and helped the kids develop their skills. (TR Vol. IV 6470). She thought his desire to be involved was sincere. (TR Vol. IV 648).

She told the jury she said she was always impressed with his willingness to share with the kids at the church. (TR Vol. IV 648). He would spot children heading for trouble, would head it off and did so voluntarily. (TR Vol. IV 648).

Mr. Eler next called Mr. Johnny Hart. (TR Vol. IV 650). Mr. Hart testified that he was a friend of the Stephens' family. He has known Stephens since he was born. (TR Vol. IV 651).

Mr. Hart knew Stephens' father really well. He knew him for 25 years. (TR Vol. IV 651). Mr. Hart went camping and fishing with Stephens and his father. (TR Vol. IV 652). Mr. Hart told the jury that Stephens was not a disciplinary problem and very respectful of both him and his father. (TR Vol. IV 652-653).

Ms. Tanya Gauldin testified next. (TR Vol. IV 654). Ms. Gauldin told the jury that Jason Stephens was a "dear friend." (TR Vol. IV 656). According to Ms. Gauldin, Stephens was a and passive person and not violent. (TR Vol. IV 656).

Stephens lived with her and her husband for eight months in

1993-1994. (TR Vol. IV 656). Stephens babysat her children often and helped with the chores. (TR Vol. IV 657). He never harmed her children. He even stayed with the kids on the weekend when she and husband went away. (TR Vol. IV 657).

Ms. Gauldin never had concerns about Stephens being left alone with her children. (TR Vol. IV 657). Ms. Gauldin told the jury that Stephens “likes children”. (TR Vol. IV 658). The kids liked him too. (TR Vol. IV 658). In her view, Stephens would never bring harm to a child. (TR Vol. IV 658). She never knew him to use drugs or alcohol. (TR Vol. IV 658).

Trial counsel next called Ms. Andrika Patterson to testify. (TR Vol. IV 659). Ms. Patterson told the jury that she is Stephens' fiancee. (TR Vol. IV 660). She told the jury she will still marry him if he is sentenced to life without the possibility of parole. The pair met at McDonalds and she finds Stephens very funny, open, and honest. (TR Vol. IV 660-661). She testified she never saw him violent and to her knowledge has never used drugs or alcohol. (TR Vol. IV 661). She described Stephens as "very sweet". (TR Vol. IV 661). Ms. Patterson told the jury she has three children and that all of her children love Stephens. (TR Vol. IV 662). She said that Stephens has spent time with them and played with them. (TR Vol. IV 663).

Trial counsel next called Father Glen Parker to testify on Stephens' behalf. (TR Vol. IV 663). Father Parker is a Roman Catholic Priest at Holy Rosary Church. (TR Vol. IV 663) He knows Stephens and sat in on the trial. (TR Vol. IV 664). Father Parker told the jury he has known Stephens since he was in the 5th grade. Father Parker taught him religion. (TR Vol. IV 664). According to Father Parker, Stephens was a very good student. (TR Vol. IV 665). He paid attention in class and was articulate. (TR Vol. IV 665).

Stephens' family attended church regularly and Stephens, himself, was very faithful in church attendance. (TR Vol. IV 666). Jason, unlike many other kids, kept attending church even after he turned 18. (TR Vol. IV 666). Stephens often came to the rectory to speak with Father Parker. (TR Vol. IV 666).

Father Parker told the jury Stephens was an altar server and was always the first to volunteer to help. (TR Vol. IV 667). The church employed Stephens for a time in the day care center. Through Father Parker, trial counsel introduced copies of Stephens' paychecks for his work at the day care center. (TR Vol. IV 658).

Once, Father Parker saw Stephens defend a child at the mall when a mother was disciplining her child very harshly. (TR Vol.

IV 669). He thought his concern for the child was a true indicator of Stephens' character. (TR Vol. IV 670).

Father Parker also ministered to Stephens after his arrest, seeing him twice weekly for two hours at a time. Father Parker believes Stephens maintains a strong faith and can hear God's voice clearly. (TR Vol. IV 670-671). Father Parker told the jury that Stephens was sensitive, intuitive, and adaptable. (TR Vol. IV 673). Father Parker testified he thought Stephens was a selfless guy who sticks up for the underdog. (TR Vol. IV 673).

Despite the wealth of mitigation evidence offered at trial, Stephens alleged, in his amended and supplemented motion for post-conviction relief, that trial counsel was ineffective for failing to adequately investigate, and present, available mitigation evidence. An evidentiary hearing was held on the claim. At the hearing, Stephens called several lay witnesses and expert witness, Dr. Jethrow Toomer. Trial counsel, Refik Eler also testified.

At the evidentiary hearing, Stephens called Brian and Michael Stephens to the witness stand. Neither testified at Stephens' trial. Brian told the court that while his father was a strict disciplinarian who would "beat" the children when they

misbehaved, their family for the most part was a "close and loving family." (PCR-T Vol. I 152). Brian described Stephens as the “black sheep of the family” because he was always getting in trouble. (PCR-T Vol. I 146).

Michael testified he had a good relationship with his brother. His Dad would punish them when they got in trouble. Most of the time it would be whippings but sometimes they had to go to bed early or were grounded. (PCR-T Vol. I 155). They got whipped with belts, switches, PCP (*sic*) pipes. (PCR-T Vol. I 155). His Dad had been in the military and imposed military type discipline on his children including push-ups and standing up against the wall or holding encyclopedias in both hands. They would also have to pull weeds. (PCR-T Vol. I 156).

Michael told the collateral court that Stephens shot him in the face when Stephens was unloading a gun. He was hospitalized for 26 days. (PCR-T Vol. I 157). Stephens and Michael got even closer after the incident. Stephens protected him. It upset Michael when his counselor, to whom both he and Stephens went after the shooting, suggested the shooting might have been intentional. (PCR-T Vol. I 158). Neither brother went back after that. (PCR-T Vol. I 158).

Michael told the collateral court that Stephens started

getting into trouble after his father died and he took his death very hard. (PCR-T Vol. I 158). He never saw his do anything strange. (PCR-T Vol. I 158). Michael is a fourth grade teacher. (PCR-T Vol. I 159).

Stephens called Sharron Davis to testify at the evidentiary hearing. She testified she and Stephens dated and then became friends. Stephens never was violent toward her. Stephens knew a Tyra Wilkerson and her children and had a great relationship with them. (PCR-T Vol. I 166). Tyra's daughter was three years old and could unlock and open a car door. (PCR-T Vol. I 166). She said this happened in Stephens' presence. (PCR-T Vol. I 167).

Mr. Tyra Wilkerson also testified at the evidentiary hearing. She and Stephens were friends. Stephens had a great relationship with her kids. Her daughter was able to unlock a car door at age three. (PCR-T Vol. I 170). Stephens had been present when she had done so. (PCR-T Vol. I 170). She testified Stephens could control his anger. According to Ms. Wilkerson, Stephens did not get angry unless provoked like everyone else. (PCR-T Vol. I 171)

Ms. Shonda Brown testified at the evidentiary hearing that Stephens was present when Ms. Wilkerson's three-year-old

unlocked and opened a car door. (PCR-T Vol. I 175). She testified that Stephens could get angry quickly. (PCR-T Vol. I 175). It would just click. (PCR-T Vol. I 175). He could not get it under control. The only person who could get it under control was her sister. (PCR-T Vol. I 176). When asked whether Stephens had a behavior problem, she testified she thought he was crazy. (PCR-T Vol. I 176). She related that he would wear a bullet proof vest and keep a gun on him at all times. (PCR-T Vol. I 176). He was always looking out the window and stating that he was going to "get them before they get me". He used marijuana. (PCR-T Vol. I 177). She did not know whether he used other drugs. (PCR-T Vol. I 177). She also described an incident where he cut his hair where he was completely bald on one side but had hair on the other. (PCR-T Vol. I 179).

During direct examination, she told the collateral court she saw Stephens the day of the murder. She said he was very paranoid that day. He got a phone call and flipped out. (PCR-T Vol. I 177). He was smoking marijuana too. (PCR-T Vol. I 178). She thought it had a funny smell and may have had cocaine in it. (PCR-T Vol. I 178).

On cross-examination, Ms. Brown testified she did not actually remember whether the things she had observed about

Stephens (the drug use and paranoia) actually occurred on the day of the murder. She related it was in 1997 and it was close in time to the Sparrow murder. (PCR-T Vol. I 18, 187).

Stephens also called Dr. Toomer to testify at the evidentiary hearing. Dr. Toomer evaluated Stephens in August 2002. He reviewed the reports of two mental health experts employed by Stephens' trial counsel at the time of trial (Drs. Miller and Knox).

Based on testing, Dr. Toomer opined there were soft signs of underlying neurological involvement (brain damage) which would suggest the need for further neurological testing. He found Stephens' IQ was about 105 which placed him in the slightly above average to average range (PCR-T Vol. I 34). He found a significant gap between Stephen's verbal IQ and performance IQ. Dr. Toomer's also administered a test designed to assess overall personality functioning (MCMI). According to Dr. Toomer, Stephens' responses reflected a number of possible hypothesis with regard to his overall functioning including psycho active substance abuse, borderline personality disorder, and a judgment disorder with anxiety. Testing also revealed a history of substance abuse. Stephens' responses on the Carlson Psychological Survey revealed a lot of underlying emotional

turmoil, a lot of cynicism, hostility, and mistrust of the environment and people around him. These personality factors influence his functioning, according to Dr. Toomer. (PCR-T Vol. I 41). In looking at his testing, Dr. Toomer opined that there was a pattern of underlying personality disturbance or personality disorganization that characterized his functioning for some time. (PCR-T Vol. I 41).

Dr. Toomer distinguished a dysfunctional personality from a major mental illness such as schizophrenia or bipolar disorder. Dr. Toomer told the court that personality disorders are lifelong while in the case of major mental illnesses one can find a time when the person was not suffering from the illness.

Dr. Toomer concluded that Stephens has a history of impulse control which manifested itself in his behavior vacillating from one end of the spectrum to the other, from adaptive to maladaptive. He does not believe the results of his evaluation suggest that Stephens is a sociopath because it was clear to him Stephens had a conscience and had the capacity to empathize. He suggested that Stephens impulsivity was related to a non-nurturing and unstable home environment, including the stern discipline handed out by his father.

Dr. Toomer opined that, on the day of the murder, Stephens

was acting under an extreme emotional disturbance based on the totality of the data. He also opined that Stephens could not conform his behavior to the requirements of the law and was unable to think out the consequences of his actions. (PCR-T Vol. I 61-62). He did not specifically identify the basis for these opinions except to say that the totality of the data suggested these conclusions.

On cross-examination, Dr. Toomer admitted the picture painted of Stephens' family by his mother, siblings, and even his priest, at trial was much different than the picture painted by Dr. Toomer at the evidentiary hearing. (PCR-T Vol I 65). Dr. Toomer reiterated his diagnosis that Stephens suffers from a borderline personality disorder with an impulse control element to it. (PCR-T Vol. I 68). Essential features of a borderline personality disorder include a persuasive pattern of instability of inter-personal relationships, self image and marked impulsivity that begins in early adulthood. (PCR-T Vol. I 71). Dr. Toomer told the court that one of the characteristics of a borderline personality disorder is difficulty controlling anger. (PCR-T Vol. I 72). He also testified that borderline personality disorder occurs frequently with other personality disorders.

Dr. Toomer told the court that a pattern of criminality is

not necessarily a characteristic of borderline personality disorder and that anti-social personality disorder can occur with borderline personality disorder. Dr. Toomer said, however, that a person can have anti-social personality traits without having the full blown disorder. (PCR-T Vol. I 76). He agreed that being unable to conform to societal norms, an ease of being deceitful, impulsivity, and aggressiveness can be features of an anti-social personality disorder. Dr. Toomer told the court that an individual who has anti-social personality disorder could show a reckless disregard for the safety of himself or others. He also agreed that a characteristic of anti-social personality disorder is that the person is irresponsible and generally displays a lack of remorse. He agreed that Stephens had anti-social traits. (PCR-T Vol. I 78). He noted that others had reached the same conclusion in the past.

Dr. Toomer told the court that Dr. Knox's report of Stephens' IQ was consistent with his own testing. He also said that his own conclusions regarding a significant difference between Stephens' verbal IQ and his performance IQ was consistent with Dr. Knox's findings. He acknowledged that Dr. Knox opined that this much difference between test scores are usually seen in individuals who act out before they think out

the consequences and is indicative of conduct disorders in children and sociopathy in adults. (PCR-T Vol. I 81).

Dr. Toomer said he disagreed with Dr. Knox because there could be other factors that are a part of that dynamic. He testified, however that there was support in the literature for Dr. Knox's opinion that this difference could suggest that Stephens is a sociopath. He also told the court he could not conclude that Dr. Knox was wrong with respect to his methodology or evaluation but he disagreed with "respect to the totality of the data that was relied upon." (PCR-T Vol I 83).

Dr. Toomer told the court that he agreed that a diagnosis of sociopathy or anti-social personality disorder is not a mitigator. He testified that juries don't look at such evidence favorably. He also agreed that such evidence indicates a person will be a life long dangerous criminal.

Dr. Toomer testified he was not aware of many of the details of Stephens' criminal history including the murder of Robert Miller in 1998 when Stephens shot him several times during a failed robbery, Stephens' plea of guilty to four counts of robbing a grocery store and all of its occupants at gunpoint, his guilty plea and conviction of robbery and attempted first degree murder in a road rage incident, and his arrest for sexual

battery in 1997 where it was alleged he tied a woman to a bedpost with bedsheets and raped her at gunpoint. Dr. Toomer told the court that a pattern of criminality is one significant feature of anti-social personality disorder. (PCR-T Vol. I 88).

Refik Eler testified at the evidentiary hearing that he consulted with two mental health experts in the Stephens' case, Dr. Knox and Dr. Miller. (PCR-T Vol. II 231). In trial counsel's view, both were in good standing and respected in the community. Trial counsel told the collateral court Dr. Miller was often called by the Court as an expert. (PCR-T Vol II 337).

Mr. Eler tasked the experts to look both at competence and insanity, and to steer him toward possible mental mitigation. (PCR-T Vol. II 231). As a result of their evaluation, Mr. Eler learned matters that he felt would be detrimental to Mr. Stephens' interest. (PCR-T Vol. II 232).

Mr. Eler pointed to Dr. Miller's conclusion that Stephens was articulate, rational, and knew right from wrong. (PCR-T Vol. II 232). Stephens also told Dr. Miller he had a "hair trigger temper". (PCR-T Vol. II 231). According to Dr. Miller's report, Stephens had a fascination with fire and a character disorder, neither of which Mr. Eler wanted the jury to hear. (PCR-T Vol. II 233-234).

It was also disclosed that Stephens had partially burned down a neighbor’s house. Mr. Eler did not wish to present the jury with evidence of an arson incident in which Stephens had been involved because he did not believe it would be useful or mitigating. (PCR-T Vol. II 232.) Additionally, Dr. Miller's report highlighted Stephens' shooting of his brother and school records that indicated he was suspended and expelled for fighting. (PCR-T Vol. II 233). Mr. Eler did not want the jury to hear about either incident. (PCR-T Vol. II 233).

Mr. Eler related that Dr. Knox's evaluation also was not helpful. Dr. Knox opined that Stephens' test performance could indicate he was manipulative and that the overall flavor of both reports was that he may suffer from an anti-social personality disorder. (PCR-T Vol. II 234). Mr. Eler told the collateral court that this kind of evaluation allows the State to essentially argue that the defendant is not going to do well in prison and you need to execute him. (PCR-T Vol. II 234). Mr. Eler testified that "I don't ever want the jury to hear that. If he has an anti-social personality disorder I will certainly not put on mental mitigation." (PCR-T Vol. II 234).

Mr. Eler pointed out to the court that Dr. Knox had clinical data to support his conclusion that Stephens may be a

sociopath. (PCR-T Vol. II 235). Mr. Eler said he had no reason to believe that either mental mitigator applied at the time of trial or that Stephens was suffering from a major mental illness. (PCR-T Vol. II 235-236).

Insofar as his overall approach to the penalty phase overall, Mr. Eler, testified that, in preparation for the penalty phase, he got an investigator on board to look at things such as employment history and educational history, to talk with family members, and to locate witnesses that can be called in the penalty phase to "humanize" the client in order to rebut the State's efforts to show that he is "not [a] nice individual[]". (PCR-T Vol II 227). After investigation, Mr. Eler testified he decided the best strategy in this case would be to show Stephens was a loving person, had a good relationship with kids, successfully babysat children, and took care of kids. (PCR-T Vol II 227-228). Mr. Eler testified that because a child died, one of his focuses was to get folks who saw him interact with kids because "ya'll were painting him to be this evil person who had no regard for the child." (PCR-T Vol II 228). Mr. Eler testified he was trying to counter the State's portrait of Stephens as a bad guy by getting family and friends who knew Stephens growing up to paint a kind of social history for the

jury. He testified he was able to find witnesses who could do just that. (PCR-T Vol II 228.

Mr. Eler testified that Stephens' position toward mitigation made it difficult because Stephens "was as close to a volunteer as I have ever had in my career." (PCR-T Vol II 227). Mr. Eler told the court that Stephens wanted to die for his past deeds. Mr. Eler said Stephens view was that he did not care what trial counsel did in mitigation.(PCR-T Vol II 229). Mr. Eler testified that Stephens did not want to involve too many people. He told the court that eventually Stephens got comfortable with the notion of calling family and friends and to talk about other purposes that God may have for his life. (PCR-T Vol II 229-230).

Stephens now faults trial counsel for failing to call lay witnesses who could have testified regarding his father's physical abuse, the shooting involving his brother, and his strange behavior both in general and on the day of the murder. Stephens also complains that trial counsel failed to call witnesses who could testify that Stephens was aware that a friend's daughter, who was the same age as Little Rob, could unlock and open car doors. Finally, Stephens faults trial counsel for failing to call Dr. Toomer and to provide the mental

health experts he did retain with sufficient information to properly evaluate him. [2] Stephens' claim should be denied.

As to the lay mitigation testimony presented at the evidentiary hearing, none of the testimony fits within the portrait of Jason Stephens that trial counsel wanted the jury to see. Likewise, none of the evidence fit within Stephens' theory of the case at the time of trial.

Rather than the extensive "human face" actually presented to the jury by trial counsel at the penalty phase, Stephens claims that trial counsel should have, instead, painted a picture of a paranoid, cocaine addicted, gun toting, brother shooting, black sheep, arsonist. Such a claim is simply without support in either law or logic. This is especially true since the one witness who testified as to his alleged paranoia and drug use on the day of the murder actually could not remember if her observations occurred on the day of the murder. (PCR-T Vol. I 181-182).

Stephens claim must fail as well because he can show no prejudice for failing to call witnesses to testify that Stephens was aware that another three-year-old child could unlock and

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[2] Stephens did not call Doctors Knox and Miller to support his claim that these two experienced experts felt they did not have sufficient information to perform a thorough and reliable evaluation of Stephens.

open a car door. Such evidence was potentially devastating to the defense.

The State's theory of the case was that Stephens asphyxiated (through suffocation or strangulation) Little Rob before he left him in the car. The defenses' theory was that Little Rob was alive when Stephens left the car, Stephens believed he would be found in short order, and Stephens did not intend to hurt him.

In order to support its theory that Little Rob was dead when Stephens left the car, the State introduced evidence the child could open the stolen Kia's car doors and windows. However, the State had no evidence that Stephens knew that Little Rob could do so.

Evidence that Stephens knew a three-year-old was capable of unlocking and opening a car door could support, not weaken, the State's theory of the case because Stephens admitted he took the child to ensure his safe escape. Having one's "insurance" quickly escape from his predicament and seek assistance would pose a significant threat to Stephens' aim to avoid capture. The evidence which Stephens now contends should have been presented may have convinced, not dissuaded, the jury that Stephens took affirmative steps to ensure Little Ron could not

ever open the car door. Counsel cannot be deemed ineffective for failing to present this evidence.

As to Stephens' allegations that trial counsel was ineffective for failing to present mental mitigation evidence, Stephens has failed to show trial counsel was ineffective. The evidence adduced at the evidentiary hearing demonstrated that trial counsel employed both an investigator to investigate Stephens' background and two mental health expert to evaluate Stephens for potential mental mitigation.

Both mental health experts' conclusions were detrimental to Stephens and trial counsel decided their testimony would not be in his client's best interest. The fact that Stephens has now, years after trial, been able to locate an expert whose opinions differ from the ones employed by defense counsel before trial does not establish counsel was ineffective. Dufour v. State, 905 So. 2d 42, 56 (Fla. 2005)(defense counsel is not ineffective for deciding not to seek an additional mental health evaluation after receiving an extremely unfavorable evaluation); Rose v. State, 617 So.2d 291, 295 (Fla. 1993) (stating that the fact that defendant obtained a mental health expert whose diagnosis differed from that of the defense's trial expert did not establish that the original evaluation was insufficient).

Additionally, the record establishes the mitigation evidence trial counsel presented was consistent with the defense theory of the case while Drs. Knox and Miller's testimony would have been antagonistic to Stephens' defense strategy. Jones v. State, 928 So.2d 1178 (Fla. 2006) (noting that "we have found no deficient performance where, although counsel was aware of possible mental mitigation, he made a strategic decision to focus on the "humanization" of the defendant through lay testimony);Johnson v. State, 921 So. 2d 490, 501 (Fla. 2005)(counsel cannot be deemed ineffective for failing to present evidence that would open the door to damaging cross-examination and rebuttal evidence that would counter any value that might be gained from the evidence.) Moreover, the evidence adduced at the evidentiary hearing established that Mr. Eler weighed the available mitigation evidence he planned to present against the potential benefits and risks of having Drs. Knox and Miller testify. Trial counsel cannot be ineffective for considering the options available to him and choosing the option that, in his view, is most consistent with the theory of this case and in the best interest of his client. Griffin v. State, 866 So.2d 1, 9 (Fla.2003) (citing Ferguson v. State, 593 So.2d 508 (Fla.1992), and State v. Bolender, 503 So.2d 1247, 1250

(Fla.1987) (holding that "[s]trategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected")).

Finally, trial counsel cannot be deemed ineffective for failing to call Dr. Toomer during the penalty phase of Stephens' capital trial. In denying Stephens' claim, the collateral court noted that Dr. Toomer's conclusions seemed to totally ignore the testimony of Stephens' witnesses at the penalty phase hearing. The court noted that Dr. Toomer seemed to suggest their description of Stephens' childhood was false. The court concluded that absent any evidence that trial counsel knew all of the family members' testimony was false, trial counsel cannot be ineffective for failing to present Dr. Toomer's testimony. The court went on to note the fact Dr. Toomer ignored all of their testimony "raises questions about the legitimacy of Dr. Toomer's opinions." (PCR-T 276). [3]

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[3] Similar to the case at bar, in Rose v. State, 787 So.2d 786 (Fla. 2001), this Court noted that Dr. Toomer's testimony had been undermined by the fact that Dr. Toomer failed to consider important information in arriving at his findings. For instance, Dr. Toomer conceded he never talked to any of the doctors who performed the earlier examinations of Rose. The State also established the doctor's failure to talk to individuals who were close to Rose to get insights on his personal relationships. As a result, the trial court rejected the mental mitigators about which Dr. Toomer testified and this Court upheld that decision.

Not only did Dr. Toomer base his conclusions on assumptions that were completely inconsistent with Stephens' social history as related by Stephens' mother, siblings, friend, and priest, Dr. Toomer was unable to pinpoint a substantive basis for his conclusion, some seven years after the murder, that both statutory mental mitigators were present on the day of the murder. Further, Dr. Toomer was unaware of the details about Stephens' prior criminal history, much of which is relevant to his conclusion Stephens is not a sociopath, and all of which would have come before the jury if trial counsel would have called Dr. Toomer to testify.

The evidence adduced at the evidentiary hearing demonstrates trial counsel made a reasoned tactical decision, consistent with the defense theory of the case. This Court should deny this claim.

B. Failure to present evidence to challenge or neutralize Stephen's prior violent felony conviction

In this claim, Stephens argues that counsel was ineffective for failing to challenge Stephens' 1992 conviction for burglary. Stephens alleges that had trial counsel effectively challenged the state's attempt to introduce this prior conviction it would not have been admissible as a prior

violent felony conviction. In the alternative, Stephens alleges counsel was ineffective for failing to present "readily available evidence" that would have rebutted or neutralize the conviction. (IB 63).

In his amended and supplemented motion for post-conviction relief, Stephens raised this claim before the collateral court.(PCR Vol. I 18-23). A evidentiary hearing was held on the claim. To support his claim of ineffective assistance of penalty phase counsel, Stephens called two time convicted felon, and admitted cocaine dealer, Jerome Tinsley. (PCR-T Vol. I 15-17).

Tinsley testified he and Stephens had known each other since they were 14 or 15 and had met at a juvenile program. (PCR-T Vol. I 8). Tinsley testified he, Stephens, and Sammie Washington went to the home of LaTonya Jackson so Sammie could see his baby. Tinsely told the collateral court that the men got into a physical altercation with Ms. Jackson's boyfriend (Donnie). Mr. Tinsley told the court they all started fighting Donnie because he was in the bed with Ms. Jackson and Sammie's baby. Tinsley said Stephens took Ms. Jackson outside when the fight started to break up. He said he did not see Stephens pull a gun on Jackson and "he ain't have no reason too." (PCR-T

Vol. I 11). He also denied hearing Stephens threaten Jackson or say in her presence he wanted to kill her. (PCR-T Vol I 12).

On cross examination, Tinsley testified he never told the police or anyone else that Stephens had not done what Jackson had alleged. Tinsley explained that Jackson had already "pointed him out" and that there was nothing he could do. When asked why he did not want to tell the police his side of the incident even though he knew Stephens was being arrested, he testified "they ain't ever ask me and told us to go home". (PCR-T Vol. I 15). He told the court he never called up a detective or anyone else and reported that he "saw the whole thing and it didn't happen the way everybody is saying it happened." (PCR-T Vol. I 15).

The collateral court denied the claim. The court noted that in order for the jurors to accept Tinsely's testimony they would have to believe that Washington, Stephens, and Tinsely went to Jackson's home at 1:30 in the morning to see Washington's child. The court concluded the jury would likewise have to completely discount the testimony of LaTonya Jackson and to ignore the fact that Stephens pled guilty not only to burglary but also to carrying a concealed firearm. (PCR Vol. II 262).

The collateral court went on to rule that in light of Stephens' pleas in connection with the burglary and Mr. Tinsley's personal involvement in the offense, "this Court doubts that Tinsley's testimony would have assisted in mitigating his role in the offense or make Jackson appear to be a less sympathetic victim." (PCR Vol. II 262).

Stephens claims before this Court that trial counsel failed to argue that Stephens' 1992 armed burglary conviction could not be used by the state in aggravation because burglary is not a prior violent felony within the meaning of the statute. Stephens argues counsel was ineffective for stipulating the burglary was a prior violent felony. Stephens also argues that trial counsel did not adequately challenge the testimony of the victim by calling Jerome Tinsley to rebut or neutralize the victim's testimony at trial.

Stephens' claim that trial counsel failed to object is specifically refuted by the record. Trial counsel objected to the conviction's admission and argued it was not a prior violent felony within the meaning of Florida's capital sentencing statute. (TR Vol IV 587).[4] The trial judge overruled the objection. (TR Vol IV 590). Because trial counsel objected to

[4] Trial counsel deposed Ms. Jackson in preparation for trial and knew the violent details of the crime. (TR Vol. IV 588).

its use as a prior violent felony conviction, he cannot be deemed ineffective for failing to do something he actually did. Knight v. State, 923 SO.2d 387, 403 (Fla. 2005) (trial counsel not ineffective for failing to object when he did object).

Stephens' second argument is equally flawed. Stephens pled guilty to burglary and to carrying a concealed firearm. There is no requirement that to be effective, counsel must retry a felony charge to which his client pled guilty. Additionally, LaTonya Jackson's testimony sufficiently established the burglary constituted a violent felony within the meaning of Florida's capital sentencing statute. Gore v. State, 706 So.2d 1328, 1333 (Fla. 1997)(whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime). As such, even had trial counsel presented Tinsley's testimony, to contrast the victim's version of events, the conviction still would have been admitted at trial and the aggravator established beyond a reasonable doubt. [5]

[5] Stephens pleas and convictions for the other crimes charged in the indictment would have been sufficient to establish the prior violent felony aggravator. Walls v. State, 926 So.2d 1156,1181 (Fla. 2005).

Finally, even if trial counsel had presented Jerome Tinsley at trial to "soften" the impact of the burglary, Stephens is still entitled to no relief. Given Tinsley's own involvement in the crime, his admitted criminal record, his relationship to Stephens, and Stephens' guilty plea to the crimes involving Ms. Jackson, there is no reasonable possibility the jury would have believed Tinsley over LaTonya Jackson. Additionally, as noted by this Court on direct appeal, Ms. Jackson's account of the events painted a remarkably similar picture to the home invasion which culminated in the death of Robert Sparrow III. Stephens v. State, 787 So.2d 747, 760 (Fla. 2001).

C. Failure to object to the prosecutor's arguments

Stephens raised a variation of this same claim in his petition for writ of habeas corpus. Stephens alleges that trial counsel's failure to object at several points during the prosecutor's penalty phase closing argument constituted ineffective assistance of counsel.

In order to prevail on his ineffective assistance of counsel claim for failure to object to the prosecutor's comments, Stephens must first show the comments were improper or objectionable. If Stephens demonstrates the comments were improper or objectionable and there was no reasoned tactical

decision for failing to object, Stephens must then show prejudice by demonstrating the comments had the effect of depriving him of a fair trial. Turner v. State, 614 So.2d 1075, 1079 (Fla. 1992) (rejecting claim that counsel was ineffective for failing to object where improper prosecutorial comments did not have the effect of depriving the defendant of a fair trial). Even if this Court were to find that some of the prosecutor's comments were ill advised, Stephens is not entitled to relief.

In his amended and supplemented motion for post-conviction relief, Stephens alleged that trial counsel's failure to object at several points during his trial constituted ineffective assistance of counsel. (PCR Vol. I 14-16). Stephens was granted an evidentiary hearing on the claim.

The collateral court denied the claim. The court found that although some of the comments objectionable, none of the comments were so prejudicial as to deprive Stephens of a fair trial. The Court found that the prosecutor’s victim impact comments, about which Stephens complains, did not cross the line of what is permissible. (PCR Vol. II 260). As to Stephens’ complaint about the prosecutor’s use of photographs that had previously been admitted into evidence, the collateral court

found that for the most part, display of the photographs was proper. For instance, the collateral court found that a photograph depicting Little Rob's size would be relevant to whether Little Rob could have opened the car door had Stephens left him alone and alive. (PCR Vol. II 260). The collateral court also found that autopsy photographs were relevant to support the State's theory that Little Rob was strangled to death before Stephens left the car. (PCR Vol. II 260). The court noted that the manner of death was at issue in the case and use of the autopsy photos were "clearly appropriate". (PCR Vol. II 260).

The collateral court found, however, that display of the photo's without arguing the photo's evidentiary relevance was designed to appeal to the sympathy of the juror and as such, was improper. The collateral court concluded, however, the prosecutor's use of the photos was not egregious nor did it affect the outcome of the jury recommendation. The court observed this was especially true, given that the jury was at liberty to view all of the admitted photographs, without limitation, in the jury room. (PCR Vol. II 261).

The collateral court correctly denied this claim. This Court should affirm for three reasons. First, Stephens failed

to make a colorable showing that any of the prosecutor's comments either alone, or cumulatively, deprived Stephens of a fair penalty proceeding or would have constituted reversible error if objected to by trial counsel, Eler. Second, Mr. Eler established there was a tactical reason for his failing to object to any comments that may have been "borderline, objectionable". (PCR Vol. II 59). Third, Stephens cannot show the prosecutor's comments and actions were so prejudicial as to taint the jury's recommendation.

Mr. Eler was questioned as to each of the penalty phase comments about which Stephens complains. As to the comments about little Rob's uniqueness as an individual human being, trial counsel testified he did not see anything objectionable about the comment. (PCR-T Vol II 220).

The prosecutor's comments were permissible as a fair comment on the victim impact evidence properly admitted at trial. Section 921.141(7), Florida Statutes (1997), permits the State to introduce victim impact evidence once the prosecution has provided evidence as to the existence of one or more aggravating factors. However, the statute limits the evidence to "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death.

Here, the prosecutor's comments stayed within the limitations outlined in Florida's capital sentencing statute. The prosecutor made no attempt to argue that victim impact evidence should be considered or weighed in aggravation.

As to the victim impact photographs, this Court has determined the use of photographs is permissible in order to show the uniqueness of the victim's life. In Branch v. State, 685 So.2d 1250, 1253 (Fla. 1996), this Court rejected Branch's claim it was improper for the prosecutor to publish a photo of the victim to the jury that depicted her taken several weeks before the crime, holding the sweater she wore when she was murdered.

This Court noted that "[f]ew types of evidence can 'demonstrate the victim's uniqueness as an individual' more aptly than a photo of the victim taken in his or her life before the crime." Branch at 1253. *See also* Alston v. State, 723 So.2d 148, 160 (Fla. 1998) (finding nothing improper about the trial court's ruling permitting the State to exhibit a full-color, eleven-inch by fifteen-inch graduation photograph of the victim during its penalty phase closing argument). Additionally, any error was cured when the trial court correctly instructed the jury that victim impact evidence could not be

considered to be an aggravating circumstance and could not be weighed as an aggravating circumstance. (TR Vol. V 788).

Likewise, Mr. Eler testified he did not think the comment about little Rob being transformed from a happy boy into a corpse was objectionable. He told the court that while the term "corpse" might be a little inflammatory, that particular word, in his view, was kind of a "milk toast" generic word. (PCR-T Vol II 221). Mr. Eler also opined that there was nothing objectionable about the prosecutor showing the jury photographs which had been admitted into evidence nor anything objectionable about the argument made by the prosecutor while showing the photographs. (PCR-T II 221)

Stephens' argument that the prosecutor may not ask the jury to look at photographs introduced at trial and argue fair inferences from those photographs is without support. This is especially so, given the jury was instructed on the HAC aggravator. Mansfield v. State, 758 So.2d 636 (Fla. 2000)(ruling that autopsy were probative in the determination of the heinous, atrocious, or cruel aggravator).

Additionally, the manner of Little Rob’s death was hotly disputed. The State asserted that Stephens asphyxiated Little Rob before he left the car. The defense asserted Stephens left

Little Rob in the car and he died "accidentally" of hyperthermia. As found by the collateral court, photos of Little Rob before his death were relevant to show his size and maturation. They also corroborated Little Rob's mother's trial testimony that Little Rob was able to open the doors and windows to the Kia.

Autopsy photos and crime scene photos were relevant to both the manner of Little Rob's death and to whether the murder was especially heinous, atrocious, or cruel. Arbelaez v. State, 898 So. 2d 25, 47 (Fla. 2005) (photos admitted were relevant to support State's theory the victim was strangled and not an accidental drowning as the defendant claimed. The fact the victim was a young child does not alter the analysis); Hertz v. State, 803 So. 2d 629, 641-43 (Fla. 2001) (finding no abuse of discretion where the photos were relevant to show the position and location of the bodies when they were found and were probative of the medical examiner's determination as to the manner of the victims' death). The photo of Little Rob's mother, taken after Stephens' left the Sparrow home, was relevant to demonstrate that Rob was likely traumatized when he saw Stephens pistol whip his mother and that the murder was committed in the course of a kidnapping. Stephens v. State, 787

So.2d 747,754(Fla. 2001) (fact that child had observed his kidnapper brandish a gun and threaten family members was part of the totality of the circumstances that established the death occurred in the course of the kidnapping).

Even if this Court were to find that any of the prosecutor's comments or actions were improper, Mr. Eler's testimony at the evidentiary hearing demonstrated his strategic approach to closing argument during the penalty phase. Mr. Eler testified that in analyzing whether to object "a lot of it's jury dynamics." He went on to tell this court that "[w]e can talk about it in a cold environment here today. You have 12 people there that you jump up and down and make objections a lot they are going to alienate you and your client, and my position has been certainly you should object if it is significant and prejudicial and improper always but pick your fights carefully. Pick your fights carefully." (PCR-T Vol. II 222).

Mr. Eler went on to explain that, in his view, penalty phase counsel should not "alienate the jury because you are going to be asking the jury to spare this man's life so that's part of my reason for not jumping up and down there on borderline, objectionable arguments." (PCR-T Vol. II 222). Mr. Eler also testified that in his view Mr. Shorstein's

delivery to the jury was "kind of milk toasty on those issues". (PCR-T Vol II 222-223).

Counsel cannot be ineffective for failing to object to the prosecutor's comments, even if they are borderline objectionable, if he makes a reasoned tactical decision not to do so. In this case, Mr. Eler's testimony established a reasonable tactical decision, not to object to comments which in his view did not hurt his client and were "milk toasty".

This Court has recently denied a claim, similar to the one Stephens makes here, in a case also tried by trial counsel, Refik Eler. In Miller v. State, 926 So.2d 1243 (Fla. 2006), the defendant alleged Mr. Eler was ineffective for failing to object to several of the prosecutor's closing arguments. During the evidentiary hearing, Mr. Eler testified his usual professional judgment at trial is to avoid objecting to the State's arguments except when absolutely necessary, and, instead, to respond in his own arguments to the State's excesses. The collateral court concluded that "it was within the wide range of professional judgment for Mr. Eler to make a tactical decision not to object to the State's closing arguments during both the guilty and penalty phases of Defendant's trial." Miller, 926 So.2d at 1253. This Court found no error. Id.

Finally, this Court may deny this claim because Stephens has failed to show that any of the comments or actions were so prejudicial as to taint the jury's recommendation of death. The prosecutor did not go outside the evidence in the case, make any improper Golden Rule arguments, engage in emotional histrionics, create any imaginary scenarios of Little Rob's suffering, denigrate the defendant or his defense, or ask the jury to show Stephens the same mercy that Stephens showed Little Rob.

In light of Stephens' failure to establish the comments were objectionable at all or were so prejudicial as to taint the jury's recommendation, and given Mr. Eler's explanation as to his reasoned tactical decision for not objecting to Mr. Shorstein's arguments, this court should deny this claim.

D. Conceding aggravators not found by the trial court

Stephens alleges, without elaboration, that because trial counsel conceded the pecuniary gain and HAC aggravators and told the jury they should be given "adequate" and "very little weight", trial counsel's performance prejudiced the outcome of the penalty phase. (IB 72). Stephens raised a variation of this claim in Claim V in this appeal and again in his petition for a writ of habeas corpus filed contemporaneously with the initial brief.

The record in this case demonstrates that trial counsel objected to the trial judge's stated intent to instruct the jury on the pecuniary gain and HAC aggravators. (TR Vol. IV 683, 685-689). The court overruled the objections and instructed the jury on each aggravator. (TR Vol. V 786-787).

Faced with the reality the trial judge would instruct on both aggravators, and given Stephens' admitted motive for entering the Sparrow home as well as Dr. Dunton's testimony that Little Rob died a prolonged death, trial counsel's argument was clearly designed to soften the impact of these two statutory aggravators. [6] Additionally, while trial counsel did, as Stephens alleges, tell the jury they should give "very little weight" to the HAC aggravator, trial counsel also attempted to persuade the jury that the manner in which Little Rob died was not the kind of prolonged aggravated death for which the HAC aggravator should be applied. (TR Vol. IV 760).

Rather than conceding the aggravator, trial counsel argued the HAC aggravator had not been proven beyond a reasonable doubt. (TR Vol. IV 760, Line 17 and 18). Trial counsel cannot

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[6] Stephens testified at the guilt phase, he entered the Sparrow home with the intent to rob everyone in the house. (TR Vol. XIII 1514). Dr. Dunton opined that it would have taken Robert Sparrow III anywhere from 30 minutes to several hours to die. Dr. Dunton found brain swelling which contraindicated a speedy death. (TR Vol. XIV 1651-1652).

be ineffective for conceding that an aggravator had been proven when he did not actually concede the point.

Moreover, trial counsel successfully argued to the trial judge during the sentencing phase that neither the pecuniary gain aggravator not the HAC aggravator applied. (TR Vol. I 355). In his sentencing order, the trial judge determined that neither aggravator applied. (TR Vol. II 390-391).

Stephens has not presented any argument in support of this claim or made any attempt to support his argument that trial counsel's performance was deficient. Moreover, Stephens has made no attempt to support his claim that absent these "concessions", the results of the proceedings would have been different. (IB 71-72). This Court should deny this claim.

E. Conceding aggravators through Stephens' guilty plea

In this claim, Stephens alleges that trial counsel was ineffective for advising Stephens to plead guilty to eight counts of the indictment. Stephens claims these guilty pleas resulted in a concession to the "in the course of a felony" aggravator.

Stephens raised this claim as a claim of ineffective assistance of counsel in the guilt phase. (PCR Vol. I 10). He also raises this same claim in this appeal as a claim of

ineffective assistance of counsel during the guilt phase. An evidentiary hearing was held on the claim.

The collateral court found neither deficient performance nor prejudice as a result of trial counsel's recommendation that Stephens plead guilty to armed burglary, three counts of robbery, two counts of attempted robbery and one count of aggravated battery. The collateral court found that trial counsel's advice to Stephens that he plead guilty to armed kidnapping was unwise and did not constitute a reasonable trial strategy. However, the court found no prejudice in view of the overwhelming evidence of Stephens' guilt, including his own testimony during the guilt phase in which he admitted to most of the crimes charged, including armed kidnapping. (PCR Vol. II 263-265).

Stephens can show neither deficient performance nor prejudice as a result of trial counsel's advice that Stephens plead guilty to eight counts of the indictment. This Court should affirm.

First, Stephens cannot show that trial counsel's advice to enter a guilty plea constituted deficient performance. In his amended and supplemented motion for post-conviction relief, Stephens alleged that trial counsel failed to discuss the

strategy behind entering a plea to several charges alleged in the indictment. (PCR Vol. I 30). Likewise, Stephens alleged he was unaware of the consequences of entering a guilty plea and his guilty plea was entered without his permission. (PCR Vol. I 11).

Stephens did not testify at the evidentiary hearing. Accordingly, Stephens presented no evidence that trial counsel failed to discuss the consequences of his pleas, that he was personally unaware of the consequences of entering a guilty plea, or that any of his pleas were entered without his permission. Moreover, the record at both the evidentiary hearing and during the plea colloquy refutes Stephens' claims.

At the evidentiary hearing, Mr. Eler testified he was present when Mr. Nichols discussed the entry of a plea with Stephens. Mr. Eler testified that Mr. Nichols explained to Stephens that the State's evidence made conviction almost certain. Mr. Eler testified that Mr. Nichols explained that pleading to some of the charges would establish a rapport with the jury both as to the remaining charges and in the penalty phase. Mr. Eler testified Mr. Nichols told Stephens he felt entering a plea was in Stephens' best interest. (PCR-T Vol. II 208).

During the plea colloquy before trial, Stephens admitted he was guilty of the eight counts to which he was pleading guilty. He told the court he had enough time to discuss his case and his decision to enter these pleas of guilty with his attorneys. (TR Vol. VI 6-10). He also told the court he was satisfied with the representation his attorneys have given him in the case and that he had discussed the entry of his pleas with people who are important to him. When asked whether anyone was making him do something he did not want to do, he said "No, sir". (TR Vol. VI 10). He told the court he had gone over the plea document, that his attorneys had read and explained it to him, and they answered any questions he may have had about the plea. (TR Vol. VI 12). He also acknowledged that his pleas could possibly be heard in his trial on the remaining counts of the indictment. (TR Vol VI 12). In addition to the record evidence refuting Stephens' allegations, there was ample evidence trial counsel's advice was reasoned trial strategy. Mr. Eler testified at the evidentiary hearing about the decision to enter the guilty pleas.

Mr. Eler told the court he agreed with Mr. Nichols' assessment Stephens would likely be convicted of the charges to which he entered a plea. He also testified he thought the

tactic threw the State off guard and kind of "threw a monkey wrench" in the State's case. (PCR-T Vol. II 208-209).

Though Mr. Eler testified he would not have entered the pleas, upon reflection, he believed Mr. Nichols strategy was to convince the jury that Stephens did not intend to kill the child, a strategy that was Stephens' contention all along. (PCR-T Vol. II 210). Mr. Eler told the collateral court this theory was a “big factor, not only in the guilt phase but the penalty phase.” (PCR-T Vol. II 210). Mr. Eler testified he believed that Mr. Nichols was trying to bring credibility to the jury. (PCR Vol. 210). Mr. Eler testified the strategy resulted in Stephens’ acquittal of some of the charges for which he pled not guilty and in "the jury believ[ing] Mr. Stephens." (PCR-T Vol II 210).

Stephens' trial testimony mirrored counsel's strategy to admit guilt to the underlying felonies but argue first, the underlying felonies had ended prior to the child's death and second, he had no intent to kill. During the guilt phase, Stephens testified he took Robert Sparrow III out of his home as "insurance to make sure I got out of the house safe." He told the jury he never intended to hurt the child. (TR Vol. XIII 1518). He also testified that when he took the child it was his intent to leave the child someplace. Stephens told the jury

that when he left the child in the car, he was alive and that he figured someone would find the child immediately as they were coming right behind him. (TR Vol. XIII 1525).

During closing argument during the guilt phase, Mr. Nichols argued the State could not establish Stephens was guilty of felony murder because the child died well after the crimes, and the flight from those crimes had ended. (TR Vol. XIV 1766, Vol. XV 1892). Additionally, trial counsel argued vigorously that Stephens had no intent to kill and should not be found guilty of premeditated murder. (TR Vol XV 1896). Mr. Nichols pointed out to the jury that Stephens pled guilty to the things he had done and was honest and forthcoming to the jury. (TR Vol. XV 1886). Mr. Nichols argued that the facts of the case fit closely into the elements of manslaughter and not any intentional killing. (TR Vol. XV 1896).

Trial counsel's strategy also carried over to the penalty phase. During closing argument, Mr. Eler told the jury the State would try to use his pleas in aggravation of the crime. Mr. Eler told the jury it should give no weight to these convictions as an aggravator but instead consider his pleas in mitigation. (TR Vol. IV 755). Mr. Eler pointed out that Mr. Stephens could have made the State prove his guilt beyond a reasonable doubt but he didn't. Mr. Eler told the jury that

Stephens freely entered pleas to everything he had done and argued the jury should consider this as evidence of Stephens' remorse and rehabilitation. (TR. Vol. IV 755-756). The trial judge also found in mitigation that Stephens had entered pleas to some counts of the indictment. (TR Vol. II 397).

This Court has determined an attorney may reasonably pursue a strategy during the guilt phase designed to save his client's life, especially in cases where the totality of the circumstances demonstrates the defendant committed the various acts constituting murder. Nixon v. State, 932 So.2d 1009,1018 (Fla. 2006); *See also* Nixon v. Florida, 543 U.S. 175, 191 (2005)(trial counsel may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared). In light of the overwhelming evidence of Stephens' guilt, trial counsel's strategy designed to save Stephens' life constituted reasonable trial strategy.

Even if this were not the case, Stephens failed to show he was prejudiced by trial counsel's advice to plead guilty to some of the charges in the indictment. The evidence of Stephens' guilt was overwhelming. Stephens v. State, 787 So.2d 747 (Fla. 2001). In addition to the victims' testimony, Stephens own testimony during the guilt phase of Stephens' capital trial

established he was guilty of the crimes for which he entered his pleas. For instance, Stephens' testimony established he was guilty of armed burglary. [7]

Stephens told the jury he entered the Sparrow home armed with a nine millimeter Ruger. Stephens told the jury he had to open a closed door to enter the home. He did not knock or otherwise have permission to enter. Stephens testified he entered the home with the intent to "rob whoever [he] found in the house." (TR Vol. XIII 1514).

Stephens admitted to the aggravated battery when he testified he struck Conseulo Brown in the face with his pistol when she confronted him about having a gun. (TR Vol. XIII 1513). Stephens admitted to the robberies when he testified he took money and dope, at gunpoint, from people in the Sparrow home (TR Vol. XIII 1526). He specifically identified Robert Sparrow Jr. and Derrick Dixon as two of his robbery victims. He testified he took a necklace from one of the people who entered the home last. (TR Vol. XIII 1526-1527). Stephens told the jury he took the keys to a car belonging to a visitor in the

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[7] Stephens makes no claim he would not have testified if trial counsel would not have advised him to plead guilty. Stephens' testimony was critical to Stephens' theory of defense that he left Little Rob alive in the car and his death was unintentional.

Sparrow home and subsequently drove away in the stolen car. (TR Vol. XIII 1522-1523).

Stephens also admitted to the kidnapping. Stephens told the jury he took Little Rob from his home to "make sure I got out of the house safe" as “insurance.” (TR Vol. XIII 1518). Stephens testified he drove Little Rob from his home, parked the stolen car, took the CD player, shut the car door and left Little Rob alone in the car. (TR. Vol. XIII 1525). Stephens told the jury he parked the car and left because "you don't drive around town with a kidnapped child in a stolen car." (TR Vol. XIII 1547).

Stephens can show no prejudice from trial counsel’s advice to enter his pleas of guilty because Stephens cannot show he would have been acquitted of all of the charges to which he entered a plea.[8] *See* Harvey v. State, 31 Fla. L. Weekly S 389 (Fla. June 15, 2006) (in light of overwhelming evidence of guilt, Harvey failed to show that, but for trial counsel’s admission of guilt during opening statement, the results of the

[8] Conviction of any charge, other than the aggravated battery would have been sufficient to support the “in the course of a felony” aggravator.

proceedings would have been different). This Court should deny his claim. [9]

ISSUE II

WHETHER TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF STEPHENS' CAPITAL TRIAL

Stephens presents several claims of ineffective assistance of counsel during the guilt phase of Stephens' capital trial. This Court should deny each of Stephens' guilt phase claims.

A. **Failure to Attend Depositions**

Stephens alleges that trial counsel was ineffective for failing to attend ten depositions. He lists, however, only eight in which he claims that neither Mr. Eler nor Mr. Nichols attended. (IB 75). The collateral court found that failure to attend depositions is presumptively deficient performance. (PCR

[9] In support of his claim of prejudice, Stephens points to the fact that Cummings was acquitted of the charges to which Stephens pled guilty. (IB 73). This argument is unpersuasive because it was Stephens' testimony at trial that likely produced that result and not a dearth of evidence. Stephens testified that Cummings was an innocent victim of circumstance. Stephens testified that Cummings had no idea Stephens was going to rob the Sparrow home and that Cummings did nothing at all. (TR Vol. XIII 1531,1539, 1573). Stephens told the jury that Cummings was a victim of his crime not a perpetrator. (TR Vol. XIII).

Vol. II 255). However, the collateral court found no prejudice. (PCR Vol. I 266).

In the bare bones argument that Stephens presents to this Court on appeal, Stephens faults trial counsel for failing to attend several depositions. Yet, Stephens fails to point to any specific deficiency at trial flowing from trial counsel's failure to attend the depositions. (IB 75).

At the evidentiary hearing, Stephens presented no evidence that Mr. Nichols failed to read or consider each of the depositions about which Stephens takes issue. Nor does Stephens point to anything in the record that supports a conclusion the outcome of the trial would have been different had Mr. Nichols personally attended all of the depositions taken in the case.

Stephens has failed to show, or for that matter to even allege, that Mr. Nichols' failure to attend the depositions either adversely affected his performance or likely affected the outcome of his capital trial. Gorby v. State, 819 So.2d 664 (Fla. 2002)(unless a defendant can show both deficient performance and prejudice, it cannot be said the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable). This Court should deny this claim.

B. ***Failure to argue motions***

In this guilt phase claim, Stephens faults trial counsel for failing to argue three motions. Stephens alleges trial counsel's performance was deficient when he failed to present argument on his motion for a judgment of acquittal, his motion for a new trial, and a motion to change venue. As to the latter motion, Stephens acknowledges that counsel for co-defendant Horace Cummings raised and argued the change of venue motion, but alleges that trial counsel, without input, joined in the motion.

(1) ***Motion for Judgment of Acquittal***

Stephens alleges that trial counsel was ineffective for failing to argument on his motion for a judgment of acquittal. However, Stephens does not allege and certainly not demonstrate that had counsel done so, the motion would have, or should have, been granted. The only "prejudice" that Stephens' alleges is that the matter would have been preserved for appeal.

While this Court, on direct appeal, held this issue was unpreserved because trial counsel made a bare bones motion for judgment of acquittal, the Florida Supreme Court also found this claim to be without merit. The Court noted there was

"sufficient evidence to support Stephens' conviction for first-degree felony murder." Stephens, 787 So.2d at 754.[10]

A trial judge should not grant a motion for judgment of acquittal "unless the evidence is such that no view which the jury may lawfully take of it, favorable to the opposite party, can be sustained under the law." Lynch v. State, 293 So.2d 44, 45 (Fla.1974); Gudinas v. State, 693 So.2d 953 (Fla.1997); Barwick v. State, 660 So.2d 685 (Fla.1995); DeAngelo v. State, 616 So.2d 440 (Fla.1993); Taylor v. State, 583 So.2d 323 (Fla.1991). Accordingly, even if trial counsel would have made an extensive and elaborate argument in support of his motion for a judgment of acquittal, the trial court would not have granted it. Because the evidence was sufficient both to go to the jury and to sustain the conviction, Stephens can show no prejudice for failing to preserve the issue for appeal." Melton v. State, 2006 Fla. LEXIS 2804 (Fla. November 29, 2006); Melendez v. State, 612 So. 2d 1366, 1369 (Fla. 1992) (When this Court has previously rejected the substantive claim on the merits about which the defendant takes issue during post-conviction proceedings in the guise of an ineffective assistance

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[10] The Florida Supreme Court found that the evidence in this case supports a finding that the murder was committed during the course of a felony. Stephens v. State, 787 So.2d 747, 754 (Fla 2001)

of counsel claim, counsel cannot be deemed ineffective for failing to make a meritless argument).

(2) ***Motion for a new trial***

On direct appeal, this Court considered Stephens substantive claim the trial court improperly denied his motion for a new trial. This Court ruled that it was not been properly preserved for appeal because Stephens' counsel made a bare bones motion for a new trial. However, this Court also ruled that, even if the issue had been preserved for appeal, this Court would find no error because the claim is without merit. Stephens v. State, 787 So.2d 747, 754 (Fla. 2001).

This Court noted that the denial of a motion for a new trial is reviewed under an abuse of discretion standard. Accordingly, in order to demonstrate abuse, the non-prevailing party must establish that no reasonable person would take the view adopted by the trial court. This Court determined that this standard had not been met, because the “manifest weight of the evidence proves, at a minimum, that Stephens committed felony murder.” Id.

Because the evidence was sufficient to defeat a motion for a new trial, Stephens can show no prejudice for failing to preserve the issue for appeal." Melton v. State, 2006 Fla. LEXIS 2804 (Fla. November 29, 2006); Melendez v. State, 612 So.

2d 1366, 1369 (Fla. 1992) (When this Court has previously rejected the substantive claim on the merits about which the defendant takes issue during post-conviction proceedings in the guise of an ineffective assistance of counsel claim, counsel cannot be deemed ineffective for failing to make a meritless argument).

(3) ***Motion for a change of venue***

Stephens cannot prevail on his claim of ineffective assistance of counsel for failing to move for a change of venue for two reasons. First, trial counsel did make a motion for a change of venue when he adopted co-counsel's extensively argued motion for a change of venue. (TR Vol. VIII 575). Accordingly, trial counsel both presented the motion to the trial court for resolution and preserved the issue for appeal.

On appeal, Stephens alleged the trial court erred in failing to grant his motion for change of venue. This Court addressed the claim on the merits. While Stephens' claim was decided adversely to Stephens, the fact this Court addressed the claim on the merits demonstrates that trial counsel's joinder of co-counsel's motion for a change of venue, adequately preserved this issue for appeal. Trial counsel cannot be ineffective for failing to do something he actually did. Knight v. State, 923

SO.2d 387, 403 (Fla. 2005) (trial counsel not ineffective for failing to object when he did object).

Additionally, this claim may be denied because Stephens failed to show any prejudice. In order to show prejudice under Strickland for failing to more vigorously pursue a motion for change of venue, Stephens must, at a minimum, "bring forth evidence demonstrating that there is a reasonable probability that the trial court should have, granted a motion for change of venue if [defense] counsel had presented such a motion to the court." Chandler v. State, 848 So.2d 1031, 1036-1037 (Fla. 2003), citing to Meeks v. Moore, 216 F.3d 951, 961 (11th Cir. 2000), and to Provenzano v. Dugger, 561 So. 2d 541, 545 (Fla. 1990) (concluding that counsel was not ineffective for failing to renew the motion for change of venue because it was a tactical decision and because "it is most unlikely that a change of venue would have been granted because there were no undue difficulties in selecting an impartial jury").

This Court’s opinion on direct appeal makes clear Stephens cannot show that had trial counsel more vigorously argued the motion or added to co-counsel’s extensive argument, that the trial court should have or would have granted the motion. This Court determined that through the trial judge's efforts, the

jury actually selected was fair and impartial. State v. Stephens, 787 So.2d 747, 757-758 (Fla. 2001).

In his motion for post-conviction relief and again in this appeal, Stephens has not demonstrated, or even alleged, that any particular juror was so tainted by pre-trial publicity that he or she was unable to set aside what he may have heard outside the courtroom and decide the case solely on the evidence and the judge's instructions. See Griffin v. State, 866 So.2d 1 (Fla. 2003); McCaskill v. State, 344 So.2d 1276, 1278 (Fla.1977) (holding the test for determining whether to grant a change of venue is whether the inhabitants of a community are so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom). Likewise, Stephens has not demonstrated, or even pointed to, any evidence that the jury actually seated was unfairly tainted by pre-trial publicity or was anything other than fair and impartial. Stephens has not demonstrated that had counsel, on his own initiative, moved for a change of venue, the motion would have or should have been granted. This claim should be denied.

C. ***Concession of Guilt***

Stephens alleges trial counsel was ineffective for pleading Stephens guilty to many of the charged offenses and by pleading him guilty to first degree murder without his permission by pleading him guilty to armed kidnapping. Stephens raised this same claim as a claim of ineffective assistance of penalty phase counsel. The State has fully addressed this claim in its response to that claim. (State Answer Brief at pages ____ to ____-). Based on the evidence adduced at the evidentiary hearing and the argument presented above, this Court should deny this claim.

D. ***Guilty plea for the robbery of Derrick Dixon***

Prior to trial, Stephens pled guilty to the robbery of Derrick Dixon. At trial, however, Dixon testified that nothing had actually been taken from him. (TR Vol XI 1193). Stephens alleges Dixon's testimony establishes trial counsel was ineffective for pleading Stephens guilty to robbing Dixon, or, alternatively in failing to follow up to withdraw the plea after trial. (IB 80-81).

Stephens may not prevail on this claim because Stephens cannot show any prejudice. Stephens can show no prejudice because there is no reasonable possibility the outcome of the trial would have been different had Stephens pled to (or been convicted of) attempted robbery rather than robbery. Likewise,

Stephens can show no prejudice because Stephens was able to use his guilty plea in support of his claim he was not guilty of first degree murder.

First, Stephens cannot show that reduction of the robbery charge probably would have resulted in a life sentence upon his conviction for murder. In fact, Stephens cannot even show his life sentence on the robbery charge would have not been imposed but for his plea.

Stephens was sentenced to life for each robbery and attempted robbery for which he was convicted. (TR Vol. II 372-378). Both attempted robbery and robbery constitute prior violent felonies for use in aggravation. Likewise, both robbery and attempted robbery can be used as a basis for a finding in aggravation that the murder was committed in the course of an enumerated felony.

Additionally, Stephens admitted a factual basis existed for the plea when he entered his pleas of guilty and testified at trial he had taken money from Derrick Dixon. During his direct testimony, Stephens testified he took $20 in cash (two $10 bills) from Derrick Dixon (TR. Vol. XIII 1527). When asked whether he heard Dixon testify that nothing had been taken from him, Stephens laughed on the witness stand and reiterated his testimony that he actually did take money from Dixon. (TR. Vol.

XIII 1527). Clearly, the jury heard Stephens' admission he had taken money from Derrick Dixon. As such, Stephen cannot show the outcome of the trial would have been different if he had not entered a plea to robbing Derrick Dixon.

Finally, Stephens benefitted from the guilty plea and should not be permitted now to take a contrary position. On direct appeal, Stephens alleged the trial judge erred in refusing to allow him to withdraw his plea to the robbery of Derrick Dixon. In denying his claim, this Court observed that Stephens benefitted from the plea because he was able to use the fact he had entered pleas, including his plea for the robbery of Derrick Dixon, to try and convince the jury that he admitted all of the crimes he committed and that he only denied those he did not commit. Stephens v. State, 787 So.2d 747, 755 (Fla. 2001). Because Stephens cannot show Mr. Nichols' advice to enter the plea in the first place, or his failure to withdraw his plea to robbery later, likely affected the outcome of his trial, his claim must fail.

E. ***Failure to Object***

Stephens alleges trial counsel was ineffective for failing to object at several points during the prosecutor's guilt phase

closing arguments. Stephens raised a variation of this claim in his petition for writ of habeas corpus. [11]

Stephens first complains about the prosecutor's comments, during opening statements, in which he "repeatedly" stated that Little Rob has been "brutally and savagely murdered", adding that the victim's fate was to "slowly fry to death". (IB 81). Stephens cites to Volume X, pages 991 and 996). The comments challenged by Stephens were made during opening statement, the purpose of which is to permit counsel to outline what he, in good faith, expects to be established by the evidence presented at trial. Conahan v. State, 844 So.2d 629, 640 (Fla. 2003); Occhicone v. State, 570 So.2d 902, 904 (Fla. 1990).

The evidence presented at trial by the State demonstrates the prosecutor's comments, which by no means were made "repeatedly", were consistent with the evidence he ultimately

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[11] In order to prevail on his ineffective assistance of counsel claim, Stephens must first show the comments were improper or objectionable. If Stephens demonstrates the comments were improper or objectionable and there was no reasoned tactical decision for failing to object, Stephens must then show prejudice by demonstrating the comments had the effect of depriving him of a fair trial. To do so, Stephens must show that these prosecutorial comments would have constituted reversible error had they been objected to at trial. Thompson v. State, 759 So.2d 650 (Fla. 2000); Turner v. State, 614 So.2d 1075, 1079 (Fla. 1992) (rejecting claim that counsel was ineffective for failing to object where improper prosecutorial

presented at trial. The evidence at trial supported the prosecutor's comments that Little Rob was brutally and savagely murdered.

Dr. Floro, a forensic pathologist, testified that in his opinion, Little Rob was suffocated to death. (TR Vol. XII 1375). Dr. Floro testified his findings, during the autopsy, were consistent with Little Rob being suffocated by an individual forcing his face into the car seat. (TR Vol. XII 1378). Dr. Floro found swelling of the brain which he opined was consistent with oxygen deprivation. (TR Vol. XII 1379).

Dr. Floro observed as well that there were no signs that Little Rob tried to get out of the car. (TR Vol. XII 1380). This evidence supported Dr. Floro's opinion that Little Rob was dead at Stephens' hands before Stephens left the car. As the State's evidence supported the prosecutor's claim that this three year old was brutally and savagely murdered, Stephens can show no reversible error.

Additionally, Stephens can show no error in the prosecutor's comments about Little Rob frying to death. First, Stephens misrepresents the prosecutor's comments. The record shows the

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comments did not have the effect of depriving the defendant of a fair trial).

prosecutor did not tell the jury that Little Rob's fate was to fry to death.

Instead, the comment came when the prosecutor told the jury he expected the defense to call an expert (Dr. Dunton) to refute Dr. Floro's testimony regarding the cause of death and who would testify that Little Rob died of hyperthermia. The prosecutor noted his testimony would be inconsistent with the fact that Little Rob was a "bright, intuitive, healthy child who would not have sat there in a car for hours in a fairly dense residential area and slowly fry to death." (TR Vol. X 995-996). Stephens can show no reversible error because the prosecutor limited his comments to the evidence he expected to be admitted at trial,

Stephens remaining complaints center around the prosecutor's comments during closing argument. Stephens alleges trial counsel was ineffective when he failed to object when the prosecutor "first opined that Mr. Stephens' testimony came from a 'warped concern' for his co-defendant then went on to query the jury 'where was the concern that he showed for a 3 year old child? There's the concern,' while again flashing a photo of the victim to the jurors." (IB 81-82)

The record establishes the prosecutor's comments were fair comment based on Stephens' testimony at trial. During the guilt phase, Stephens took the stand on his own behalf. Stephens

testified he went to the Sparrow home with three other men, including co-defendant Horace Cummings. (TR Vol. XIII 1509). Stephens refused to identify any of his accomplices at the time of his arrest. Likewise, Stephens refused, on the witness stand, to identify the other two men who accompanied him to the Sparrow home. (TR Vol. XIII 1536-1537).[12] Stephens also told the jury that co-defendant Horace Cummings had nothing to do with the robbery and that Cummings was a victim of the robbery too. (TR Vol. XIII 1531, 1537, 1539).

As to Little Rob, Stephens testified he tried to make it easy to find the car by leaving it in front of somebody's house. (TR Vol. 1529). Stephens told the jury he did not deliberately try to hurt the child. (TR Vol. XIII 1530). He also testified when he left Little Rob in the car, he figured someone from the Sparrow household would be coming right behind him. (TR Vol. XIII 1525).

In view of Stephens' testimony he took actions to facilitate Little Rob's immediate rescue, the prosecutor's contrast of Stephens' deliberate actions to protect the men who went with him to the Sparrow home with his actions leading to Little Rob's death was fair comment on the defendant's self-

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[12] Co-defendant Cummings turned himself in.

serving statements. Stephens failed to show error, let alone reversible error, in this brief comment.

Stephens' argument regarding the photographs is equally without merit. His suggestion the prosecutor may not ask the jury to look at photographs introduced at trial and argue fair inferences from those photographs is without support. This is especially true as the jury was instructed on the HAC aggravator during the penalty phase and the means of Little Rob's death during the guilt phase was in dispute. *See e.g.* Mansfield v. State, 758 So.2d 636 (Fla. 2000) (ruling that autopsy was probative in the determination of the heinous, atrocious, or cruel aggravator). Stephens' second complaint about the prosecutor's closing argument is equally without merit. Stephens claims it was improper for the prosecutor to tell the jury that "My job is to represent the State of Florida and to seek justice" and "If the State has not proven the defendant's guilt beyond a reasonable doubt, then I'm not sure it can be done in any case." (IB 82). Stephens alleges these comments sought to "bolster the credibility of the State's case." (IB 82).

Stephens can demonstrate no error, let alone reversible error, when the prosecutor told the jury what, in his view, his job was. This comment followed trial counsel's comment during

the defense closing argument that the prosecutor's job "is to persuade you that the evidence that's been presented proves his theory of the case beyond a reasonable doubt." (TR Vol. XIV 1756). Trial counsel went on, at length, to argue that the State had failed in their job to prove their case and instead was content to persuade the jury by providing them with a convenient legal theory to justify "this thing." (TR Vol. XIII 1757). A bit later, trial counsel told the jury that the State wants it to "want to convict these people so badly that you will distort and twist and stretch these definitions (referring to aspects of felony murder) to make it fit. (TR Vol. XIII 1765).

In response and in context, the prosecutor began his remarks by stating that Mr. Nichols "told you what my job is. My job is to represent the State of Florida to seek justice." (TR Vol. XIV 1767). A prosecutor's comments are not improper where they fall into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. Walls v. State, 926 So.2d 1156, 1166 (Fla. 2006). Trial counsel's attempt to portray the prosecutor as one who would try to persuade the jury to distort and twist the facts simply to make them fit the prosecution's theory of the case invited the prosecutor's brief and accurate comment.

Likewise, the prosecutor's assertion the State had met its burden of proof was not improper. The comment came after the defendant testified on his own behalf and admitted entering the Sparrow home with the intent to commit robbery, robbing its occupants, kidnapping Little Rob, and leaving him in the car in which he would die. Nothing precludes the State from advocating that the evidence supports a finding of guilt beyond a reasonable doubt.

The comment also followed trial counsel suggestion the prosecutor was acting outside the bounds of the law simply to get a conviction. Certainly, nothing should preclude the State from rebutting trial counsel's inference the State would willfully act unethically and unlawfully simply to win a conviction. Stephens provides no support for his claim that appellate counsel was ineffective for failing to raise this comment as a claim of error on direct appeal.

Lastly, Stephens complains the prosecutor improperly characterized Stephens' testimony as melodramatic and untruthful and implied that Stephens had been convicted of other crimes. (IB 83). When reading the prosecutor's comments in context, it is clear the other crimes to which the prosecutor referred were the crimes committed against the other people in the Sparrow home. The prosecutor noted that "you saw him, his theatrical

testimony, melodramatic, lying, maybe he's bragged and lied so often about so many crimes--do you remember how proud he was where he said about Derrick Dixon, "he didn't even know I robbed him, but yeah, I robbed him." (TR Vol. XV 1819).

No reasonable juror would fail to understand the prosecutor's charge of untruthfulness was made solely in reference to the evidence presented at trial. Further, no reasonable juror could fail to understand the prosecutor was merely submitting to the jury a conclusion he believed could properly be drawn from the evidence. A review of Stephens' testimony, as it compares to other witnesses, makes clear the prosecutor's comments only sought to have the jury draw its own conclusions as to Stephens' credibility. Calling a defendant a braggart and a liar when the evidence points to a conclusion he is a liar and a braggart is not reversible error. Lugo v. State, 845 So.2d 74, 107 (Fla. 2003).

Even if any of the prosecutor's arguments, alone or cumulatively, could be deemed improper, Stephens' claim that trial counsel was ineffective for failing to object must fail because during the guilt phase of his capital trial, Stephens admitted his involvement to the armed burglary of the Sparrow home, the robbery of some of its occupants, and the kidnapping of Little Rob. He also admitted leaving Little Rob in the

closed car where he was found dead some seven hours after the kidnapping. Given his admissions, Stephens cannot show that trial counsel's failure to object likely would have changed the outcome of his capital trial or would have resulted in a finding of reversible error on appeal. This Court should affirm.

F. **Delegation of Responsibilities**

In his last claim of ineffective assistance of counsel, Stephens faults trial counsel for delegating his responsibilities to co-counsel. He raises many of the same issues he raised in previous claims, specifically not attending depositions and simply joining in motions filed by co-counsel, rather than filing them on his own. These issues have been discussed at length above and the State will not repeat those same arguments here.

Stephens also complains that trial counsel delegated his responsibility by allowing co-counsel to call what he described as the witness "most critical to Mr. Stephens' defense, Dr. Dunton and by allowing co-counsel to cross-examine many witnesses. [13]

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[13] Stephens also claims trial counsel failed to cross-examine numerous witnesses, leaving it to co-counsel instead. Even so, Stephens fails to point to any questions that trial counsel should have asked that were not asked. Stephens also fails to allege how this particular alleged delegation of

Stephen's allegations that trial counsel was ineffective for failing to calling Dr. Dunton himself, rather than leaving it to co-counsel, is wholly without merit. This is true for two simple reasons.

First, it does not matter, in a joint trial, who calls a witness. What matters is that the witness is called.

As Stephens himself admits, Dr. Dunton provided critical testimony that, without a doubt, benefitted Stephens. Stephens offered Dr. Dunton's testimony to rebut the State's argument Stephens suffocated Little Rob before leaving him in the car. Dr. Dunton opined the child was not suffocated but instead died of hyperthermia. Stephens v. State, 787 So.2d 747, 752 (Fla. 2001).

Additionally, it was trial counsel, Refik Eler, who suggested this witness be consulted by the defense team. (PCR-T Vol. II 217). Dr. Dunton's testimony also led the trial judge to find in mitigation that Stephens did not intend to kill the child, a mitigator to which he gave significant weight.

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responsibilities prejudiced his client, especially given trial counsel's apparent strategy to gain credibility with the jury. As Stephens presents no argument on this particular claim, it should be deemed abandoned. Shere v. State, 742 So.2d 215, 218 n.6 (Fla. 1999) (claims in which the defendant does not present any argument or that do not allege on what grounds the trial court erred in denying the claims are insufficiently presented for review).

Stephens can show no prejudice from trial counsel's decision to leave it to co-counsel to call Dr. Dunton.

Second, and perhaps just as significantly, allowing co-counsel to call Dr. Dunton preserved first and last closing argument for Stephens and his trial counsel. (TR Vol. XIV, 1754, 1885). Preserving first and last closings is a strategy that any reasonable trial counsel might employ. Reasonable trial counsel may even decide to forgo presenting favorable evidence to preserve first and last closing.

At the evidentiary hearing, trial counsel, Eler, testified first and last closing is a "significant advantage" at trial. Mr. Eler told the court that it's "always been my opinion that the person who speaks last to the jury has a big advantage because you can really hammer home your points without the other side getting up and rebutting them." (PCR-T Vol. II 237). Mr. Eler testified that by not calling Dr. Dunton themselves, they preserved the advantage of first and last closing arguments that Cummings did not have. (PCR-T Vol. II 236-237).

Here, trial counsel was able to have his proverbial cake and eat it too. Because co-counsel called Dr. Dunton to the witness stand, trial counsel was able to present favorable testimony to the jury refuting the State's theory as to the cause of little Rob's death. Because it was co-counsel that

called Dr. Dunton to testify, trial counsel was also able to preserve first and last closing. Stephens has failed to show either deficient performance or prejudice as a result of allowing the co-defendant to call Dr. Dunton. This Court should deny the claim.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING STEPHENS' CLAIM THAT TRIAL COUNSEL WAS OPERATING UNDER A CONFLICT OF INTEREST

In his third claim before this Court, Stephens alleges two separate violations of his right to conflict-free counsel. The gravamen of Stephens' claims is that trial counsel were ineffective because of alleged conflicts of interests.

A conflict of interest claim emanates from the Sixth Amendment guarantees of effective assistance of counsel. Wright v. State, 857 So. 2d 861, 871 (Fla. 2003). In order to prevail on this claim, Stephens must prove, first, that an actual conflict of interest exists. Herring v. State, 730 So. 2d 1264, 1267 (Fla. 2002).

An "actual" conflict of interest exists if counsels' course of action is affected by conflicting representation, *i.e.*, where there is divided loyalty with the result that a course of action beneficial to one client would be damaging to the interests of the other client. An actual conflict forces counsel to choose

between alternative courses of action. Stevenson v. Newsome, 774 F.2d 1558, 1562 (11th Cir. 1985), *cert. denied*, 475 U.S. 1089 (1986); Hunter v. State, 817 So.2d 786, 792 (Fla. 2002). A possible, speculative or merely hypothetical conflict is "insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350. "[U]ntil a defendant shows that his counsel actively represented conflicting

interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id.

If a defendant successfully shows that trial counsel actively represented competing interests, he must then show this conflict adversely affected trial counsels' performance during Stephens' capital trial. Herring v. State, 730 So.2d 1264, 1267 (Fla. 2002). *See also* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)(ruling that in order to show a violation of the right to conflict-free counsel or to establish a claim of ineffectiveness premised on an alleged conflict of interest, the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance"); Quince v. State, 732 So.2d 1059, 1065 (Fla.1999). In his first claim, Stephens has failed to meet his burden to show that any actual conflict of interest adversely affected trial counsels' performance at trial. In his second, he fails to present a claim of an actual conflict of interest at all. This Court should deny both claims.

A. Representation of a Co-defendant on the prior violent felony conviction

In his first conflict of interest claim, Stephens alleges that trial counsel, Refik Eler, had an actual conflict of interest because he had, some five years before Stephens' capital trial, represented Sammie Washington on a burglary

charge involving state witness Latonya Jackson. Stephens alleges that because he was Washington's co-defendant on this same charge, and because the State used this 1992 conviction in aggravation as a prior violent felony, trial counsel had an actual conflict of interest. Stephens alleges Mr. Eler's prior representation of Sammie Washington "restrained him from properly challenging Mr. Stephens' prior violent felony conviction." (IB 89). Stephens claims the conflict precluded trial counsel from either calling Washington as a witness or taking a position antagonistic to Washington. (IB 89).

In Claim V of his amended and supplemented motion for post-conviction relief, Stephens presented the same claim he makes before this Court. (PCR Vol. I 25). An evidentiary hearing was held on this claim.

Mr. Eler testified, at the evidentiary hearing, that he believed that at the time of Stephens' capital trial, he did not even remember he had previously represented Sammie Washington. (PCR-T 293-294). He testified he did not recall learning anything from the investigation of Washington's case that would have assisted him in attacking the state's assertion that Stephens' 1992 burglary conviction qualified as a prior violent felony conviction. (PCR-T Vol. II 226). Mr. Eler told the court that if he would have learned something that may have assisted

in the Stephens' case, he absolutely would have used it. (PCR-T Vol. II 226).

Mr. Eler also testified that if he had perceived any kind of conflict, he would have brought it to the court's attention and would have moved to withdraw. (PCR-T Vol. II 226). He also told the court that Mr. Nichols would have been available to present any "conflict" evidence. (PCR-T Vol. II 226).

The collateral court denied this claim. The court noted that it had found no evidence that Mr. Eler's representation of Sammie Washington negatively affected or impacted Stephens' defense. The collateral court ruled that it "rejected the claim that Eler was deficient in this area and also rejects Stephens' suggestion that any alleged deficiency relates to a conflict of interest." (PCR Vol. II 263).

Stephens' claim must fail for two reasons. First, Stephens failed to show that Mr. Eler actively represented competing interests.

Stephens acknowledges Mr. Eler's representation of Sammie Washington occurred in 1992, some five years before Stephens' capital trial commenced. Stephens presented no evidence that Mr. Washington's burglary charge had not been fully resolved at the time of Stephens' trial or that Mr. Eler's prior representation of Mr. Washington created a situation whereby

calling Mr. Washington to the witness stand would have been beneficial to Stephens but damaging to Mr. Washington. Likewise, Stephens presented no evidence that Mr. Eler's prior representation of Mr. Washington forced counsel to refrain from calling Mr. Washington during the penalty phase of Stephens' capital trial because doing so would have required Mr. Eler to take "a position antagonistic to Washington." (IB 89). Indeed, Stephens fails to even suggest what this position would have been.

Mr. Eler's undisputed testimony at the evidentiary hearing demonstrated he did not even recall, at the time of Stephens' capital trial, that he had represented Sammie Washington. (PCR-T 293-294). Additionally, Mr. Eler did not recall learning anything from the investigation of Washington's case that would have assisted him in attacking the state's assertion that Stephens' 1992 burglary conviction qualified as a prior violent felony conviction. (PCR-T Vol. II 226).

As Mr. Eler did not even recall at the time of Stephens' trial that he had represented Mr. Washington or remember anything he learned during the course of that representation, Mr. Eler could not have been forced to choose between alternative courses of action. Nor could he have been faced with any divided loyalty. It is axiomatic that when one is

unaware of the prior representation, the prior representation cannot have created divided loyalties or forced a choice between alternative courses of action. *See e.g.* Hunter v. State, 817 So. 2d 786, 793 (Fla. 2002) (where trial counsel was unaware the Office of the Public Defender had represented a state witness, there was no actual conflict of interest); McCrae v. State, 510 So. 2d 874 (Fla. 1987).

Stephens claim must also fail because even if this Court were to conclude that Mr. Eler actively represented competing interests, Stephens failed to demonstrate Mr. Eler's representation of him was adversely affected by Eler's previous representation of Sammie Washington. In order to demonstrate that counsel's performance was adversely affected by competing interests, Stephens would have to show some causal connection between the conflict and the decision not to call Sammie Washington to the witness stand during the penalty phase of Stephens' capital trial. Likewise, Stephens would have to show some benefit lost by trial counsel's failure to present Mr. Washington's testimony. McCrae v. State, 510 So.2d 874, 877 n.1(Fla. 1987) (noting that in order to show actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefitted the defense. Only when an actual conflict is

shown to have affected the defense is there shown prejudicial denial of the right to counsel).

Stephens avers that, absent the alleged conflict, Eler would have called Washington as a witness during the penalty phase of Stephens' capital trial. In making this claim, Stephens implies Washington's testimony would have served to either contradict the testimony of LaTonya Jackson as to the circumstances of the 1992 burglary or, at the very least, provided the jury with different versions of the burglary and Stephens' role in it. [14]

Stephens did not call Sammie Washington to the stand during the evidentiary hearing in order to demonstrate the crime did not occur the way LaTonya Jackson reported it or to show that Sammie Washington told Mr. Eler something within the protection of the attorney-client privilege that could have been useful in refuting Jackson's version of the events surrounding Stephens' 1992 burglary conviction but would have been harmful to his own

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[14] Stephens acknowledged during the evidentiary hearing he pled guilty to the burglary involving Latonya Jackson. (PCR-T 292). LaTonya Jackson testified at trial that, in 1992 Stephens and two companions entered her home while she was with her boyfriend. Ms. Jackson was sixteen years old at the time. Ms. Jackson told the jury that Stephens had a sawed-off shotgun which he placed against Ms. Jackson's head and threatened to kill her. Stephens v. State, 784 So.2d 747, 760 (Fla. 2001).

interests. Indeed, the only evidence in the record is Mr. Eler's uncontradicted testimony he did not recall learning anything during his representation of Mr. Washington that would have assisted him in attacking the state's claim the burglary qualified as a prior violent felony. (PCR-T Vol. II 226).

By failing to present Mr. Washington as a witness to demonstrate his testimony would have been beneficial to the defense or to present any evidence to support a finding by the collateral court judge that Mr. Eler was confronted with divided loyalties because of his previous representation of Sammie Washington, Stephens has failed to demonstrate that his right to conflict free counsel was violated. This Court should deny this claim.

B. Representation of Co-defendants with Adverse Interests

In what purports to be Stephens' second claim of a violation of his right to conflict-free counsel, Stephens alleges he was actually represented by Allen Chipperfield, counsel for co-defendant, Horace Cummings. (IB 90). Stephens alleges that because Mr. Chipperfield actively represented both Horace Cummings and Jason Stephens, and because Cummings and

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This testimony alone would have been sufficient to establish Stephens' 1992 burglary conviction as a prior violent felony.

Stephens' defenses were antagonistic to each other, he is entitled to a new trial. (IB 91).

This Court should deny this claim because Stephens does not present a claim of a violation of his right to conflict-free counsel. Essential to a claim of a violation of the right to conflict-free counsel is evidence that the attorney, about which the defendant complains, actually represented the defendant at trial. Sliney v. State, 31 Fla. L. Weekly S 776 (Fla. Nov. 9, 2006)(in order to establish an ineffectiveness claim premised on an alleged conflict of interest a defendant must establish that an actual conflict of interest adversely affected his (emphasis mine) lawyer's performance).

In this case, the evidence adduced at the evidentiary hearing established that Allen Chipperfield represented co-defendant, Horace Cummings. (PCR-T Vol. I 124). The evidence also established that Refik Eler and Richard Nichols, not Allen Chipperfield, represented Jason Stephens. (PCR-T 191).

In presenting a claim he is entitled to a new trial because Mr. Chipperfield labored under an actual conflict of interest, Stephens improperly attempts to re-litigate his claims of ineffective assistance of counsel that Stephens already raised in Claims I and II of his initial brief. Stephens even admits he already raised these claims before this Court in his initial

brief. (IB 90). The State has fully addressed each of the allegations of ineffective assistance of counsel that Stephens alludes to in his claim and as such will not repeat these arguments here. As Stephens has failed to present an actual claim that his right to conflict-free counsel was violated, this Court should reject this claim.

CLAIM IV

WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE A MOTION REQUESTING A JURY INTERVIEW OR MOTION FOR NEW TRIAL

In this claim, Stephens alleges that trial counsel was ineffective for failing to pursue a motion requesting a jury interview after jury foreman, Dr. Roland Buck, told a reporter from the *Florida Times Union*, that the jury believed that Mr. Stephens did not intend to kill the victim but "the child died as a result of the robbery [and] that is why we convicted him. If he had not removed the child from the house, the child would be alive today." (IB 94). Stephens alleges this statement was inconsistent with the jury's finding that Stephens killed the victim, attempted to do so, intended the death of the victim, or acted with reckless disregard of life. (IB 94).

In support of his claim, Stephens points to the fact that Dr. Buck's media statement made no mention of reckless indifference on Stephens' part. (IB 96). Stephens claims that,

as such, trial counsel was ineffective for failing to persist in a motion to interview jurors. (IB 96).[15]

Stephens raised this claim before the collateral court in his amended and supplemented motion for post-conviction relief. (PCR Vol. I 50). The collateral court judge denied the claim. (PCR Vol. II 277).

The collateral court ruled that Dr. Buck's statement to the *Florida Times Union* was not inconsistent with the jury's finding that Stephens played a significant role in the underlying felony and acted with a reckless disregard for human life. (PCR Vol. II 277). Moreover, the court pointed to this Court's determination in Stephens v. State, 787 So.2d 747, 760 (Fla. 2001) that Stephens was "indifferent to the fate of his helpless child." (PCR Vol. II 277). The collateral court ruled trial

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[15] The record reflects that trial counsel filed a motion to interview the jury. (TR Vol. II 363-364). Trial counsel withdrew the motion when the State withdrew its objection to the trial court considering the article when determining Stephens' sentence. (TR Vol. V 867).

Trial counsel told the trial court that he did not believe that "in any way, shape or form misconduct of the jury." (TR Vol. V 868). The State informed the trial court that it would not object to the Court considering the article in mitigation if the court chose to do so. (TR Vol. V 868). The Court agreed to consider it before rendering sentence. (TR Vol. V 869). The Court made no promises how much weight it would give the article or whether it would give the article any weight at all.

counsel was not ineffective for failing to pursue a jury interview or new trial. (PCR Vol. II 277).

This Court should deny this claim for two reasons. First, Stephens cannot show trial counsel's performance was deficient because Dr. Buck's statements did not give rise to grounds for a juror interview.

In view of the strong public policy against allowing litigants to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it, this Court has set a high hurdle over which a defendant must leap before he can interview his jurors. First, the moving party must bring forth, under oath, allegations, that if true, would require the trial court to order a new trial. Johnson v. State, 804 So.2d 1218 (Fla. 2001); Baptist Hospital of Miami v. Maler, 579 So.2d 97 (Fla.1991)(ruling that in light of strong public policy against allowing litigants either to harass jurors or to upset a verdict by attempting to ascertain some improper motive underlying it, an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial).

Second, inquiry may be permitted only in the face of allegations which involve an overt prejudicial act or external influence. Marshall v. State, 854 So.2d 1235, 1241-1242 (Fla.

2003); Devoney v. State, 717 So.2d 501 (Fla. 1998).[16] Even now, Stephens does not allege any overt act of juror misconduct. Rather, Stephens claims that trial counsel should have persisted in his motion for a juror interview to discover if juror misconduct occurred. (IB 96).

Additionally, matters which inhere in the verdict or seek to invade the jury's deliberative process may not be the subject of juror interviews. On its face, the statement reflected matters that went to the heart of the jury's consideration of whether it should recommend that Stephens be sentenced to death for the murder of Robert Sparrow III. Dr. Buck's statement, even if it did reflect the view of the entire jury, was a matter that inhered in the verdict.

Belief about Stephens' intent to kill reflects the jury's opinion or impression about Stephens' state of mind at the time of the murder. Such conclusions are matters inherent to the deliberative process and are relevant and proper considerations

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[16] Impermissible external influences or overt prejudicial acts would include cases in which a juror related personal knowledge of non-record facts to other jurors, an assertion a juror received information outside the courtroom, a juror is improperly approached by a party, the jury votes by lot or game of change, where jurors allegedly read newspapers contrary to the court's orders, or where jurors directed racial slurs against the defendant. Marshall v. State, 854 So.2d 1235, 1241-1242 (Fla. 2003); Devoney v. State, 717 So.2d 501 (Fla. 1998)

to the jury's sentencing recommendation. As such, these impressions fall squarely within the type of matters in which the Florida Supreme Court has precluded inquiry. *See* Baptist Hosp. of Miami, Inc. v. Maler, 579 So.2d 97, 99 (Fla.1991) (an inquiry that seeks to elicit information about subjective impressions and opinions of jurors is not permitted).

Because Dr. Buck's statement to the media involved matters that inhered in the verdict, it did not give rise to legal grounds for a jury interview. As such, trial counsel's decision not to pursue the motion did not constitute ineffective assistance of counsel.

This Court may also deny this claim because Stephens failed to show prejudice as a result of his decision to withdraw his motion for a juror interview. During argument on Stephens' motion to interview jurors as a result of Dr. Buck's media statement, the trial court specifically found the comments were related to matters inherent in the verdict and not in the nature of jury misconduct. (TR Vol. V 869). Accordingly, even if trial counsel would have persisted in his motion, the trial court would have denied it. Devoney v. State, 717 So. 2d 501, 502 (Fla. 1998) (The jurors' mental thoughts and beliefs which relate to what occurred in the jury room during the jury's

deliberation inhere in the verdict and may not be the subject of jury inquiry).

Moreover, even if the jury did not believe Stephens intended to kill three-year-old Robert Sparrow III, the death sentence was still a permissible recommended sentence. Accordingly, Stephens cannot show that a juror interview would to bring to light matters that, if true, would mandate this court to order a new penalty phase.

Before penalty phase deliberations commenced, the trial court instructed the jury it could not consider the death penalty as a possible punishment unless it was convinced beyond a reasonable doubt, and unanimously, that the defendant killed the victim, or intended the victim to be killed, or that he played a significant role in the underlying felony and acted with reckless indifference to human life. (TR Vol. V 785-786). A verdict form requiring a specific finding of fact (YES/NO) on this issue was provided to the jury. (TR Vol. V 792). The jury made the requisite findings by checking "YES" on the verdict form. (TR. Vol. II 335).

In its sentencing order, the trial court also found that at a minimum, the evidence established beyond a reasonable doubt that Stephens acted with reckless indifference to human life. (TR. Vol II, 387). On direct appeal, this Court found that

Stephens acted with indifference to human life. Stephens v. State, 787 So.2d 747, 760 (Fla. 2001) (concluding that the record of trial demonstrates that Stephens was indifferent to the fate of this helpless child). This Court also found that Stephens was not merely an aider and abetter in a felony where a murder was committed by others. Instead this Court found that Stephens personally committed the crimes of burglary and robbery, kidnapped the child victim, drove him to a location unknown to his parents and left him in a hot, closed car. Id.

In addition to this Court's decision on direct appeal in this case, controlling United States Supreme Court and Florida Supreme Court case law in other cases demonstrate death is a permissible sentence even if Stephens did not intend to kill the child in the course of the robbery or kidnapping. In Enmund v. Florida, 458 U.S. 782, 797 (1982), the United States Supreme Court held that the Eighth Amendment of the United States Constitution does not permit imposition of the death penalty on a defendant who only "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." In Tison v. Arizona, 481 U.S. 137,158 (1987), the Supreme Court refined Enmund and explained that death was a permissible sentence under a felony

murder theory when the defendant was a major participant in the felony committed and acted with a reckless indifference to human life. *See also* Chamberlain v. State, 881 So.2d 1087,1109 (Fla. 2004)(noting that death is permissible when the defendant is a major participant in the underlying felony and acts with reckless indifference to human life); Franqui v. State, 804 So.2d 1185, 1206 n. 12 (Fla.2001) (noting that Edmund/Tison application would allow death sentence where defendant was a major participant in the felony committed and acted with a reckless indifference to human life); Van Poyck v. State, 564 So.2d 1066, 1070-71 (Fla.1990) (finding the death sentence proportionate where the defendant was the instigator and primary participant in the underlying crimes, came to the scene "armed to the teeth," and knew lethal force could be used).[17]

As established by the law of the case, Stephens was the principal actor in a burglary and robbery. He personally kidnapped three year old Robert Sparrow III from his home, and left him alone in a hot car in a place unknown to his parents. This Court found specifically that Stephens personally committed the underlying felonies of burglary, robbery and kidnapping and

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[17] The trial court applied the Edmund/Tison standard in determining whether to impose the death penalty. (TR. Vol. II 388).

that his actions demonstrated Stephens was indifferent to the fate of this helpless child. The Court found that, under the circumstances, death was a permissible sentence. Stephens 787 So.2d at 760.

Even if Stephens had persisted in his motion and been granted a jury interview, and the jurors would have agreed that Dr. Buck's statement accurately reflected the jurors' impressions that Stephens did not intend to kill the child, death was still a permissible recommended sentence. Because Stephens cannot show that a juror interview would to bring to light matters that, if true, would mandate this court to order a new penalty phase, Stephens can show no prejudice from trial counsel's decision to withdraw his motion to interview jurors. His claim should be denied.

CLAIM V

WHETHER THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY INSTRUCTING THE JURY REGARDING AGGRAVATING FACTORS WHEN, AS A MATTER OF LAW, THESE FACTORS DID NOT APPLY AND WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY OBJECT AND/OR CONCEDING THESE AGGRAVATORS TO THE JURY

In his final claim before this Court, Stephens claims that trial court committed fundamental error when it instructed the jury on the heinous, atrocious or cruel (HAC) aggravator when as a matter of law it did not exist. Stephens also claims the

trial court erred in instructing the jury on the pecuniary gain aggravator because the State failed to demonstrate that pecuniary gain was the "primary motive for the killing." (IB 99). Finally, Stephens, without any argument, alleges trial counsel was ineffective for failing to adequately challenge both aggravators and by conceding the aggravators to the jury. [18] Stephens raised a variation of this claim in his petition for writ of habeas corpus filed contemporaneously with the initial brief in this appeal.

A. HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATOR

Stephens argues the HAC aggravator did not apply because he lacked the requisite intent to kill. (IB 97). Additionally, Stephens claims the HAC aggravator did not apply, as a matter of law, because the trial judge did not find, beyond a reasonable doubt, the murder was especially heinous, atrocious, or cruel. (IB 97). Though not entirely clear, it appears that Stephens' second argument is that fundamental error occurs if, based on the evidence presented at trial, the trial judge instructs the

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[18] While trial counsel was not successful in his attempt to prevent the jury from being instructed on these two aggravators, trial counsel successfully argued to the trial judge the aggravators were not proven. The trial judge, in his sentencing order, rejected both the HAC and pecuniary gain aggravators. (TR Vol. II 390, 391)

jury on an aggravator but later rejects it in his sentencing order. Stephens' claim is without support in law or logic.

This claim should be denied for two reasons. First, the claim is procedurally barred. Substantive challenges to jury instructions may be raised on direct appeal. Failure to do so acts as a procedural bar in post-conviction proceedings. Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000)(substantive challenges to these jury instructions are procedurally barred because Thompson could have raised these claims on direct appeal). As Stephens failed to challenge the adequacy of the evidence to support the HAC instruction on direct appeal, Stephens is procedurally barred from bringing this substantive claim in these proceedings.

Second, this claim should be denied because it is without merit. This Court has held that a finding of HAC is proper in murders that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another. Brown v. State, 721 So. 2d 274, 277 (Fla. 1998). The HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. Card v. State, 803 So. 2d 613,624 (Fla. 2001). Accordingly, contrary to Stephen's suggestion he did not have the requisite

intent to permit the trial judge to instruct the jury on the HAC aggravator, the focus on the HAC aggravator is not on the intent of the assailant, but on the actual suffering caused to the victim. Schoenwetter v. State, 931 So. 2d 857, 874 (Fla. 2006). *See also* Barnhill v. State, 834 So. 2d 836,850) (Fla. 2002) (concluding that if a victim is killed in a torturous manner, a defendant need not have the intent or desire to inflict torture, because the very torturous manner of the victim's death is evidence of a defendant's indifference).

Competent substantial evidence supported the trial judge's decision to instruct Stephens' jury on the HAC aggravator. The evidence adduced at trial showed that Robert Sparrow III died an extremely torturous death brought on by Jason Stephens' utter indifference for the life of a child he kidnapped from the safety of his home. Stephens can demonstrate neither error nor prejudice in the trial judge's instruction on the HAC aggravator. Floyd v. State, 850 So. 2d 383, 405 (Fla. 2002)(where competent, substantial evidence supports the trial judge's decision to do so, it is not error to instruct the jury on the HAC aggravator). The fact the trial judge later concluded the aggravator had not been proven beyond a reasonable doubt, because he did not believe Stephens intended to kill Robert Sparrow does nothing to undermine the propriety of

instructing the jury on an aggravator supported by evidence adduced at trial.

In the case at bar, as found by this Court on direct appeal, the evidence demonstrated that Stephens kidnapped Robert Sparrow from his home and his parents' care on June 2, 1997 at about 2:30 p.m., drove him away in a stolen dark colored Kia, and parked the car on the side of the street, without the benefit of any shade, on a hot and sunny day. The windows in the car were rolled up and all of the doors were closed. Some seven hours later, Little Rob was found dead in the car. Stephens v. State, 787 So.2d 747, 751 (Fla. 2001).

At trial, the State proceeded on a theory that Stephens suffocated Little Rob before he abandoned him in the stolen Kia. The defense proceeded on a theory Stephens left Little Rob alive in the car and Little Rob died a prolonged death caused by hyperthermia. Even accepting Stephens' claim he left the child alive in the car, Stephens own defense expert laid the foundation for the trial judge to properly instruct the jury on the HAC aggravator.

Dr. Steve Dunton testified he was the medical examiner in Atlanta. (TR Vol. XIV 1616). Dr. Dunton opined that Little Rob died of hyperthermia and his death "took some time to occur." (TR Vol. XIV 1630). He testified that on the day of the murder,

June 2, 1997, there were 13 hours of sunshine which was the longest duration of daylight hours in the entire month of June. (TR Vol. XIV 1625-1626).

According to Dr. Dunton, there was nothing to provide shade to the area where Stephens parked the Kia. Dr. Dunton testified the temperature in the car, under the circumstances would have reached the low hundreds if not higher. (TR Vol. VIX 1639). Dr. Dunton told the jury he would expect that Robert Sparrow III would have suffered periods of panic and increased anxiety prior to his death. (TR Vol. XIV 1652). Dr. Dunton opined that it would have taken Robert Sparrow III anywhere from 30 minutes to several hours to die. (TR Vol. XIV 1651-1652). Dr. Dunton found brain swelling which contraindicated a speedy death.

Stephens can show no error, let alone fundamental error, because the trial judge properly instructed the jury on the HAC aggravator. Stephens own expert presented competent substantial evidence to support a conclusion that Robert Sparrow died a prolonged tortuous death at the hands of the defendant. Duest v. State, 855 So. 2d 33, 47 (Fla. 2003) (evidence of prolonged suffering is sufficient to support HAC).

Even this Court, on direct appeal, concluded the record of trial demonstrated that Stephens was indifferent to the fate of this helpless child. Stephens v. State, 787 So.2d 747, 751

(Fla. 2001). As Stephens can make no showing the trial judge's instruction to the jury on the HAC aggravator constituted error, let alone fundamental error, Stephens' claim should be denied.

This Court should also deny Stephens' bare bones allegation of ineffective assistance of counsel. The record reflects that trial counsel objected to instructing the jury on the HAC aggravator and argued vigorously the aggravator did not apply. (TR Vol. IV 685-689). Stephens seems to base his claim of ineffective assistance of counsel on the premise that counsel did not argue it well enough. Counsel cannot be ineffective for failing to object when in fact he did so. Knight v. State, 923 SO.2d 387, 403 (Fla. 2005) (trial counsel not ineffective for failing to object when he did object). Stephens claim should be denied. [19]

B. The Pecuniary Gain Aggravator

Stephens claims the trial court committed fundamental error when it instructed the jury on the pecuniary gain aggravator when as a matter of law, this factor did not apply. (IB 99).

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[19] Even if trial counsel had not objected, Stephens' claim would be without merit. As there was competent substantial evidence to support the HAC instruction, trial counsel cannot be ineffective for failing to object. Johnson v. State, 593 So. 2d 206, 210 (Fla. 1992) (trial counsel not ineffective for failing to object to instruction when the trial judge committed no error in instructing the jury).

Stephens argues the pecuniary gain aggravator did not apply, as a matter of law, because pecuniary gain was not the primary motive for the killing. (IB 99). Stephens also claims the instruction was vague because the jury was not told that in order to apply, pecuniary gain had to be the primary motive for the killing. In support of his argument, Stephens points to this Court's 1988 decision in Scull v. State, 533 SO.2d 1137 (Fla. 1988). Stephens also points to the trial judge's sentencing order that found the theft of property had already been completed by the time the murder happened. (IB 99).

This claim should be denied for two reasons. First, Stephens' substantive challenge to the trial judge's instruction on the pecuniary gain aggravator is procedurally barred. Substantive challenges to jury instructions may be raised on direct appeal. Failure to do so, acts as a procedural bar in post-conviction proceedings. Thompson v. State, 759 So. 2d 650, 665 (Fla. 2000). As Stephens failed to challenge the adequacy of the evidence to support the pecuniary gain instruction on direct appeal, Stephens is procedurally barred from bringing this substantive claim in these proceedings.

Stephens constitutional challenge to the pecuniary gain instruction, on vagueness grounds, is also procedurally barred. This Court has explicitly stated that postconviction challenges

to the constitutionality of jury instructions will not be entertained unless there has been an objection on constitutional grounds at trial for preservation of appellate review and the issue has been asserted on direct appeal. Anderson v. State, 822 So. 2d 1261,1269 (Fla. 2002). As Stephens did not raise this claim on direct appeal, the claim is procedurally barred.

Second, this claim may be denied because it is without merit. Stephens is mistaken when he claims that in order to establish the existence of the pecuniary gain aggravator, the State must prove that pecuniary gain was the primary motive for the killing.

To establish a murder was committed for pecuniary gain, the State is required only to show beyond a reasonable doubt the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. Harris v. State, 843 So.2d 856 (Fla. 2003)(ruling that in order to establish the aggravating factor of pecuniary gain, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain).

Stephens is also mistaken when he claims there was no competent substantial evidence to support the pecuniary gain instruction. Prior to trial, Stephens pled guilty to armed

burglary of Little Rob's home and to the robbery of some of the home's occupants. Additionally, Stephens testified during the guilt phase of his capital trial that he entered the Sparrow home with the intent to rob anyone in the house. (TR Vol. XIII 1514).

Stephens' argument turns on the notion that, because the burglary of Little Rob's home and the robbery of its occupants were over by the time Stephens committed the murder, pecuniary gain could not be proven as a matter of law. The contrary is true.

This Court has upheld the pecuniary gain aggravator when the murder was the culmination of events that began when the defendants went into the store to commit the robbery and abducted the cashier at gunpoint. In Parker v. State, 873 So.2d 279 (Fla. 2004), Parker and three co-defendants (Bush, Cave, and Johnson) robbed a convenience store. Once the money had been obtained, the defendants abducted the 18-year-old female clerk and took her to an isolated location some 20 minutes away from store. Parker shot the victim and another co-defendant stabbed her.

This Court upheld the pecuniary gain aggravator noting that "murder was the culmination of a course of events that began when appellant went into a store, robbed the clerk at gunpoint,

and abducted her from the store." Parker v. State, 873 So. 2d at 290 (Fla. 2004). Likewise, in Copeland v. State, 457 So.2d 1012 (Fla. 1984), this Court upheld the pecuniary gain aggravator when Copeland and three co-defendants robbed the Junior Food Store in Wakulla County, Florida and abducted the cashier at knifepoint. The men took the cashier to a hotel, raped her, and then took her to the woods and shot her three times in the head. Based on a finding the cashier's murder was a culmination of the armed robbery, this Court upheld the pecuniary gain aggravator. Copeland v. State, 457 So.2d at 1019.

Little Rob's murder was the last in an unbroken series of events that began with Stephens' armed entry into Little Rob's home, the robbery of its occupants, and the kidnapping of Little Rob for the purpose of effecting an escape. When competent substantial evidence supports the trial judge's decision to instruct the jury on a statutory aggravator, there is no error. Floyd v. State, 850 So. 2d 383, 405 (Fla. 2002).[20]

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[20] As to Stephens' one sentence argument that counsel was ineffective for failing to "adequately challenge this aggravating factor," this claim is also without merit. IB 100). Trial counsel objected to the court instructing the jury on the pecuniary gain aggravator and raised the same arguments that Stephens raises here. Trial counsel argued that because pecuniary gain was not the motive for the murder and that the taking had already been completed by the time the murder occurred, the trial judge should not instruct the jury on the

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Stephens' amended and supplemented motion for post-conviction relief.

Respectfully submitted,

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pecuniary gain aggravator. (TR Vol. IV 683). The trial court disagreed and ruled it would give the instruction. (TR Vol. IV 685). Trial counsel cannot be ineffective for failing to object when he did object. Knight v. State, 923 SO.2d 387, 403 (Fla. 2005) (trial counsel not ineffective for failing to object when he did object). Moreover, even if trial counsel had not objected, Stephens' claim would be without merit. As there was competent substantial evidence to support the pecuniary gain instruction, trial counsel cannot be ineffective for failing to object. Johnson v. State, 593 So. 2d 206, 210 (Fla. 1992) (trial counsel not ineffective for failing to object to instruction

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to D. Todd Doss, P.O. Box 3006, Lake City, FL 32506-3006, this 4th day of December 2006.

_____
Meredith Charbula
Assistant Attorney General

CERTIFICATE OF FONT AND TYPE SIZE

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

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Meredith Charbula

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when the trial judge committed no error in instructing the jury).