IN THE SUPREME COURT OF FLORIDA

JAMES BELCHER,

Appellant,

CASE NO. SC05-1372

v.

STATE OF FLORIDA,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JAMES BELCHER, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the appeal of a trial court's denial of a 3.851 motion, following an evidentiary hearing, in a capital case. The facts of the crime, as recited in the Florida Supreme Court's direct appeal opinion, are:

> The evidence presented at trial indicated that some time after 10:30 p.m. on January 8, 1996, but before 9 p.m. on January 9, 1996, James Belcher (Belcher) gained access to the victim's townhouse, where she lived alone.[1] Belcher sexually battered victim Jennifer Embry (Embry) and then killed her by placing his hands around her neck and holding her head under water in the bathtub until she could no longer breathe. At 2 a.m. on January 9, 1996, Maxine Phillips, Embry's next door neighbor, was awakened by loud noises, which came from the common wall she shared with Embry. Phillips described the noises as three hard knocks, as if someone was knocking against the wall.
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> Medical Examiner Bonifacio Floro testified that the cause of Embry's death was both manual strangulation and drowning. White foam, a product of the mixture of air, water, and mucous in the trachea and bronchial tree, was discovered coming out of Embry's nose and mouth, which indicated to the medical examiner that she was alive and breathing when her head was submerged in the water. Linear bruising on Embry's neck and small internal hemorrhaging on her larynx and hyoid bone were consistent with her being manually strangled while she was still alive. Dr. Floro testified that Embry suffered from the following nonfatal injuries before her death: vaginal injuries consistent with forcible entry by a penis or object; a bruise above the right eyebrow; and a laceration to the right shoulder. He stated that the injuries were "fresh," indicating that they had been inflicted within twenty-four hours of Embry's death. Dr. Floro found spermatozoa in Embry's vagina and opined that they were "fresh" due to the fact that they still had both heads and tails at the time of the autopsy. Dr. Floro stated that although he could not pinpoint the time of the placement of the sperm, he opined that the condition of the sperm indicated that they had been

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[1] No signs of forced entry were found at Embry's home. Embry's neighbor, Anna Alford, testified that she saw Embry come home alone at 10:30 p.m. on January 8, 1996. Ricky Embry, the victim's brother, testified that after Embry missed school and work on January 9, 1996, he went to her home around 9 p.m. to check on her. As he placed his key into the lock, the door "just came open." Ricky found Embry's body in the bathtub.

placed there probably during a sexual act some time between three and six days before the autopsy.[2]

Detective Robert Hinson, the lead detective assigned to the case, testified that in the bathroom where Embry's body was found, there were some things apparently out of place. He related the following observations of the bathroom: one of the two parallel shower curtain rods was askew and had been propped up against the wall with a towel; one of the two shower curtains was pulled over to one side of the rod; the plastic hook that held up the decorative shower curtain was missing from the wall and found in the bathroom trash can with a piece of wall board still attached; and a strip from the plastic shower curtain liner was found in the bottom of the bathtub.

At the time of the murder, Belcher lived with his sister in a house that was close to the Florida Technical College, where Embry had attended classes until her death. Belcher had twice been observed at Florida Technical College in connection with Embry. Elaine Rowe, an employee at Florida Technical College, testified that in the winter of 1995, a man came into Rowe's office and asked for Embry by name, requesting that Embry be retrieved from her class. Rowe had someone retrieve Embry from her class and testified that to her knowledge, the man and Embry interacted that day. From a police photo-lineup, Rowe identified Belcher as the man who came to her office, and she identified Belcher in court. Derrick Scott, a classmate of Embry's with whom she had a five-month affair, testified that one day before October of 1995, he walked out of class at Florida Technical College, and observed a man standing by Embry's car, talking with her. Scott identified Belcher from a side-shot photo, displaying a facial scar, as the man he saw talking with Embry by her car. Scott also identified Belcher in court.

On August 4, 1998, Detective Hinson questioned Belcher about Embry's murder. During that interview, Belcher denied (1) ever being at Embry's home, (2) ever having sex with Embry, and (3) ever meeting Embry. After Derrick Scott identified Belcher from a photo, Detective Hinson obtained a search warrant for a sample of Belcher's blood. At the time of the blood draw, Hinson observed that Belcher was nervous and holding a Bible, and that he had urinated on himself.

James Pollack, lab analyst for the Florida Department of Law Enforcement (FDLE), testified that the semen discovered in Embry's vagina and on a bedroom slipper found in the bathroom near her body contained DNA matching Belcher's DNA profile.

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[2] Dr. Floro explained that sperm can survive longer in a dead body than a living body. He performed Embry's autopsy on January 10, 1996.

Belcher v. State, 851 So.2d 678, 679-681 (Fla. 2003)(footnotes included).

The jury found Belcher guilty of first-degree murder on the theory of both premeditation and felony murder, and guilty of sexual battery. After a penalty phase hearing, the jury voted nine to three, in favor of a death sentence. The trial court followed the jury's recommendation and imposed a death sentence for first-degree murder and sentenced Belcher to twenty-five years imprisonment for sexual battery. The trial court found that the State proved beyond a reasonable doubt the following aggravators in support of Belcher's death sentence: (1) the defendant has been previously convicted of a felony involving the use or threat of violence to some person (great weight); (2) the capital felony was committed while the defendant was engaged in the commission of the crime of sexual battery (great weight); and (3) the capital felony was especially heinous, atrocious, or cruel (HAC) (great weight). The trial court found that all of the mitigating factors that were presented were proven sufficiently for the Court to give them consideration. The mitigating factors in this case, all of which were nonstatutory, were: (1) in his relationship with family members, Belcher is considerate, generous and concerned; (2) Belcher loves his parents, brother, sisters, cousins, aunts, and uncles, and they love him; (3) Belcher has not lured anyone else in his family into trouble with the law, he has actually discouraged family members from engaging in criminal behavior and used himself as an example as to why they should not get involved in criminal activity; (4) Belcher has done many kind things for his family; (5)

in spite of personal problems, Belcher has encouraged his cousins to do well; (6) Belcher has often been a mentor and a role model of integrity to his relatives; (7) Belcher has maintained contact with relatives even while in prison and continues to provide them advice and counsel, sometimes over the phone; (8) Belcher was raised in a high crime area in New York and was evidently unable to resist the temptations of crime; (9) Belcher was sent to adult prison at an early age and it affected his development; (10) Belcher has never abused alcohol or drugs; (11) Belcher has shown concern for younger inmates at Appalachee Correctional Institute (ACI) and has had a positive effect on their lives by being a tutor, basketball coach, a good listener, a counselor to young inmates, and a peacemaker; (12) Belcher can continue to help other inmates in the future, as evidenced by those who testified at the penalty phase; (13) Belcher has not been a discipline problem either in prison or in the pretrial detention facility for the period of his recent incarceration; (14) Belcher displayed proper behavior during trial; and (15) Belcher displayed appropriate remorse and genuine concern for the distress caused to his family and the victim's family during the *Spencer*[3] hearing. The sentencing order indicates that the trial court assigned "some weight" to all of the mitigators, except for (11) and (12), to which it assigned "greater weight."

Belcher, 851 So.2d at 681-682 (footnotes included).

[3] See *Spencer v. State*, 615 So.2d 688 (Fla. 1993)

On direct appeal to the Florida Supreme Court, Belcher raised four issues: (1) did the trial court abuse its discretion by allowing the prosecutor to argue the escalating nature of belcher's prior violent felonies in closing argument of the penalty phase; (2) did the trial court abuse its discretion in giving the hac instructions and in finding the homicide to be HAC; (3) did the trial court abuse its discretion by giving the standard instruction on mitigating circumstances and refusing to give a special specific nonstatutory mitigating circumstances instruction and (4) does *Apprendi v. New Jersey*, 530 U.S. 466 (2000) apply to capital cases where the jury recommends death. The Florida Supreme Court also addressed the sufficiency of the evidence to convict and the proportionality of the death sentence. *Belcher*, 851 So.2d at 682 & 686. The Florida Supreme Court affirmed Belcher's conviction for first-degree murder and sexual battery and his death sentence. *Belcher*, 851 So.2d at 679.

Belcher filed a petition for writ of certiorari in the United States Supreme Court raising whether a death sentence imposed in a case with the prior violent felony aggravating circumstance violated *Ring v. Arizona*, 536 U.S. 584 (2002). On December 1, 2003, the United States Supreme Court denied certiorari. *Belcher v. Florida*, 540 U.S. 1054, 124 S.Ct. 816, 157 L.Ed.2d 706 (2003).

On November 12, 2004, Belcher filed a 3.851 motion raising fourteen claims: (1) Belcher claims that his defense attorneys, Assistant Public Defenders, Alan Chipperfield and Lewis H. Buzzell, III, were ineffective for failing to object to the prosecutor’s explanation of “reasonable doubt”; (2) that his trial counsels were

ineffective for failing to object to the prosecutor's comments which post-conviction counsel asserts minimized the jury's view of its role in capital sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); (3) his trial counsels were ineffective for telling prospective jurors that mitigating circumstances must be proven beyond a reasonable doubt; (4) his trial counsels were ineffective for not objecting to the prosecutor's comment regarding mitigators outweighing aggravators and for not correcting a chosen jurors statement that the defendant must prove that mitigating circumstances outweighing aggravating circumstances; (5) his trial lawyers were ineffective for failing to object to the prosecutor's comments regarding premeditated murder; (6) his trial counsels were ineffective for not objecting to the prosecutor's comment regarding motive; (7) his trial counsels were ineffective for conceding facts in violation of *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*) and *Nixon v. State*, 857 So.2d 172 (Fla. 2003)(*Nixon III*); (8) his trial counsels were ineffective for allowing victim impact evidence during the guilt phase and emotional appeals to the jury; (9) his trial counsel was ineffective for not presenting a defense gynecologist expert to prove that the victim vaginal injuries could have been sustained during consensual sex rather than sexual battery; (10) his trial counsels were ineffective for failing to object to the testimony of an inmate that inmates are allowed to watch television and play basketball while incarcerated because it amounts to non-statutory aggravation; (11) that trial counsels was ineffective for failing to call seven identified

mitigation lay witnesses in the penalty phase; (12) that his death sentence violates the mandates of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (13) that the State failed to disclose information that an FDLE Orlando lab worker was suspended and an FBI lab tech failed to use control samples in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and (14) there was cumulative ineffectiveness of counsel.[4] On January 11, 2005, the State filed a response asserting that the trial court should summarily deny claims 2, 4, 6, 8, 9, and 12 but hold an evidentiary hearing on claims 1, 3, 5, 7, 10, 11, 14, and 15.

Judge Dearing, who presided at the trial and penalty phase, also presided at the postconviction proceedings. On January 24, 2005, the trial court held a *Huff* hearing[5]. The trial court ruled that an evidentiary hearing was necessary on claims 1, 3, 5, 7, 9, 10, 11, 14, and 15. On April 27, 2005 and May 6, 2005, the trial court held an evidentiary hearing. Both the defense and the State filed written closing arguments following the evidentiary hearing. The trial court denied the motion for postconviction relief following the two day evidentiary hearing.

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[4] The motion omitted any claim 13 and claim 15 preceded claim 14.

[5] *Huff v. State*, 622 So.2d 982 (Fla. 1993).

SUMMARY OF ARGUMENT

ISSUE I - Belcher claims that his defense attorneys, Assistant Public Defenders, Alan Chipperfield and Lewis H. Buzzell, III, were ineffective for failing to object to the prosecutor's explanation of "reasonable doubt". There was no deficient performance. As trial court testified at the evidentiary hearing, there is no basis to object. The prosecutor's explanation of reasonable doubt was a correct statement of the law. Nor is there any prejudice. The trial court properly instructed the jury on the definition of reasonable doubt. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE II - Belcher claims that his trial counsels were ineffective for failing to object to the prosecutor's comments which post-conviction counsel asserts minimized the jury's view of its role in capital sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The trial court properly denied this claim of ineffectiveness without an evidentiary hearing. This claim did not require an evidentiary hearing because Florida Supreme Court's caselaw establishes that it is meritless as a matter of law. There was no deficient performance because there was no basis for any objection as this Court has repeatedly held. Nor was there any prejudice. The prosecutor's comments correctly described the jury's role in sentencing in Florida. If anything the prosecutor's comments and the trial court's jury instructions inflate, not denigrate, the jury's role in sentencing in Florida. The trial court properly denied this claim.

ISSUE III - Belcher contends his trial counsels were ineffective for failing to object to the prosecutor not explaining the lower burden of proof regarding mitigators during jury selection. Counsel's performance was not deficient. There was no basis for an objection. While defense counsel may discuss the lower burden if he wishes, he cannot force the prosecutor to do so. Defense counsel does not have this type of control over the prosecutor's remarks. There was no prejudice from the prosecutor's omission. The jury was instructed on the lower burden of proof for mitigators. The trial court properly denied this claim following an evidentiary hearing.

ISSUE IV - Belcher asserts that his trial counsel were ineffective for failing to object to the prosecutor's questions regarding death being the appropriate sentence if aggravating circumstances outweigh mitigating circumstances. Belcher asserts that the prosecutor's questions and a juror's answers during jury selection amounted to a "presumption of death." There is no deficient performance because any such objection would be baseless. This claim is meritless under both this Court's and United States Supreme Court's precedent. This Court has repeatedly rejected any claim that prosecutor's comments or the standard jury instruction shift the burden to the defendant to prove life is the appropriate sentence. The United States Supreme Court has recently held that a state statute allowing a death sentence even if aggravators and mitigators are equal was constitutional. Thus, the trial court properly summarily denied this claim.

ISSUE V - Belcher asserts that his trial lawyers were ineffective for failing to object to the prosecutor's comments regarding premeditated murder. There was no deficient performance because there was no basis to objection. The prosecutor's comments regarding premeditation were correct statements of the law. Moreover, there was no prejudice. The jury was properly instructed on the concept of premeditation. Thus, the trial court properly denied the claim.

ISSUE VI - Belcher claims that his trial counsels were ineffective for not objecting to the prosecutor's comment regarding motive. There was no deficient performance because there was no basis for any objection. The prosecutor's comment that the prosecution does not have to prove motive was an accurate statement of the law. There was no prejudice either. The jury was properly instructed on premeditation. The trial court properly summarily denied this claim.

ISSUE VII - Belcher claims that his trial counsels were ineffective for conceding facts in violation of *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*), and *Nixon v. State*, 857 So.2d 172 (Fla. 2003) (*Nixon III*). *Nixon* claims are now governed by the *Strickland* standard. There is no deficient performance or prejudice. Trial counsel did not concede that Belcher was perpetrator. Trial counsel merely conceded that the victim was dead. This is not the type of "concession" covered *Nixon*. A true *Nixon* claim requires that counsel concede, not that a crime occurred, but that his client was the perpetrator of that crime. Defense counsel disputed the identity of the perpetrator.

Nor was there any prejudice. A mere concession that a crime occurred, but the defendant did not commit the crime does not harm a defendant. So, there was no prejudice. The trial court properly denied this claim following an evidentiary hearing.

ISSUE VIII - Belcher contends that his trial counsels were ineffective for allowing victim impact evidence during the guilt phase and emotional appeals to the jury. There was no deficient performance. Trial counsel did object to the brother's testimony and on the ground that it was victim impact evidence. Furthermore, there is no prejudice. The prosecutor withdrew the question. The trial court properly summarily denied this claim.

ISSUE IX - Belcher asserts his trial counsel was ineffective for not presenting a defense gynecologist expert to prove that the victim vaginal injuries could have been sustained during consensual sex rather than sexual battery. There was no deficient performance. The expert presented at the evidentiary hearing would not have helped the defense. He agreed that this was a rape and with the state's medical experts findings. Defense counsel are not require to retain their own experts, when they can cross-examine the State's expert to the same effect. There was no prejudice either. The trial court properly denied this claim following an evidentiary hearing.

ISSUE X - Belcher asserts that trial counsel were ineffective for failing to object to the testimony of the inmates that they are allowed to watch television and play basketball while incarcerated because it amounts to non-statutory aggravation. There was no deficient performance. Defense counsel responded rather than

objecting. This is a reasonable strategic decision. This is not non-statutory aggravation. As Defense counsel testified, it was worth presenting the inmates' testimony regardless of the prosecutor's attempt to cross on prison conditions because the judge found the testimony regarding the defendant being helpful to the inmates as a mitigator. The trial court properly denied this claim following an evidentiary hearing.

ISSUE XI - Belcher asserts that trial counsel was ineffective for failing to call several mitigation lay witnesses in the penalty phase. There was no deficient performance. Trial counsel interviewed most to the witness presented at evidentiary hearing by collateral counsel but decided not to present them because they were not goo witnesses. This is a reasonable strategic decision. There was no prejudice. Defense counsel presented eleven witnesses during the penalty phase, including Belcher's mother, his sister, and two aunts. Counsel presented family mitigation. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE XII - Belcher asserts that the trial court improperly found that there was no cumulative error in this case. There was no error and, hence, no cumulative error. The trial court properly denied the claim of cumulative error.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR"S COMMENTS REGARDING REASONABLE DOUBT? (Restated)

Belcher claims that his defense attorneys, Assistant Public Defenders, Alan Chipperfield and Lewis H. Buzzell, III, were ineffective for failing to object to the prosecutor's explanation of "reasonable doubt". IB at 7-11. There was no deficient performance. As trial court testified at the evidentiary hearing, there is no basis to object. The prosecutor's explanation of reasonable doubt was a correct statement of the law. Nor is there any prejudice. The trial court properly instructed the jury on the definition of reasonable doubt. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

Standard of review[6]

The standard of review is *de novo*. *Morris v. State*, 931 So.2d 821, 828 (Fla. 2006)(explaining that "when reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance claim, this Court gives deference to the trial court's factual findings to the extent they are supported by competent, substantial evidence, but reviews *de novo* the trial court's determinations of deficiency and prejudice, which are mixed questions of fact and law.").

[6] Because most of the remaining claims are ineffectiveness claims, the standard of review is the same for these issues. In the interest of brevity, the standard of review will not be repeated for each issue.

Ineffectiveness[7]

As this Court recently explained in *Ferrell v. State*, 918 So.2d 163, 169-170 (Fla. 2005):

> . . .to prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive the defendant of a fair trial. In reviewing counsel's performance, the reviewing court must be highly deferential to counsel, and in assessing the performance, every effort must "be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." As to the first prong, the defendant must establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." For the prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Ferrell, 918 So.2d at 169-170 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

The Eleventh Circuit, in an *en banc* decision, discussed the performance prong of *Strickland*. *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000)(en banc). The *Chandler* Court noted that the cases in which habeas petitioners can properly prevail are few and far between. The standard for counsel's performance is reasonableness under prevailing professional norms. The purpose of

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[7] Because most of the remaining claims are ineffectiveness claims, the legal standard is the same. In the interest of brevity, the legal standard for ineffectiveness will not be repeated for each issue.

ineffectiveness review is not to grade counsel's performance; rather, the purpose is to determine whether the adversarial process at trial, in fact, worked adequately. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. Counsel does not enjoy the benefit of unlimited time and resources. Every counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial. Thus, no absolute duty exists to investigate particular facts or a certain line of defense. And counsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly. For example, counsel's reliance on particular lines of defense to the exclusion of others--whether or not he investigated those other defenses-- is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable. Because the reasonableness of counsel's acts (including what investigations are reasonable) depends critically upon information supplied by the petitioner or the petitioner's own statements or actions, evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. Counsel is not

required to present every non-frivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Considering the realities of the courtroom, more is not always better. Stacking defenses can hurt a case. Good advocacy requires winnowing out some arguments, witnesses, evidence, and so on, to stress others. No absolute duty exists to introduce mitigating or character evidence. The reasonableness of a counsel's performance is an objective inquiry. Because the standard is an objective one, that trial counsel admits his performance was deficient matters little. When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger. Even the very best lawyer could have a bad day. No one's conduct is above the reasonableness inquiry. Just as we know that an inexperienced lawyer can be competent, so we recognize that an experienced lawyer may, on occasion, act incompetently. However, experience is due some respect. No absolute rules dictate what is reasonable performance for lawyers. The law must allow for bold and for innovative approaches by trial lawyers. And, the Sixth Amendment is not meant to improve the quality of legal representation, but simply to ensure that criminal defendants receive a fair trial. These principles guide the courts on the question of reasonableness, the touchstone of a lawyer's performance under the Constitution. *Chandler*, 218 F.3d at 1312-1319.

Here, Belcher has two additional hurdles. Belcher had not one, but two experienced public defenders. His defense attorneys were Assistant Public Defenders, Alan Chipperfield and Lewis H. Buzzell, III. The standard for ineffectiveness requires that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1314-1315 (11th Cir. 2000)(en banc). Here, two attorneys agreed as to the trial tactics and strategy. Moreover, both attorneys had extensive capital experience. *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)(en banc)(noting that when courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger). Lewis Buzzell was lead counsel on the guilt phase and Alan Chipperfield was lead counsel in the penalty phase. (EH May at 32). Alan Chipperfield started with the Public Defenders office in May of 1979. (EH May at 27). He has handled numerous murder cases and numerous capital cases. (EH May at 27). Lewis Buzzell started working at the Public defender's Office in August of 1977 and has been handling death penalty cases since the early 1980's. (EH May at 49). Both the number of counsel and their respective experience lessen any possibility of ineffectiveness.

Trial

The prosecutor, Assistant State Attorney, Bernardo De La Rionda, during jury selection, stated:

> Do all of you understand that as we sit here today the defendant, Mr. Belcher, is presumed to be innocent? Do all

of you understand that? Okay. Can all of you agree with that? Okay. **Do you understand that does not mean he is innocent**? It means he is presumed to be innocent until you hear evidence to the contrary. Can all of you agree with that?

(T. XI 81).

Evidentiary hearing testimony

At the evidentiary hearing, postconviction counsel asked defense counsel, Mr. Chipperfield, why he did not object to this comment, defense counsel responded that he did not object because the comment is not objectionable. (EH May at 7). He did not think he could "fashion" an objection to the comment. (EH May at 8).

The trial court's ruling

> In the first claim for relief, Defendant alleges that counsel rendered ineffective assistance by failing to object and request a curative instruction in response to the State's voir dire misstatements of the burden of proof and the presumption of innocence to the jury. At the evidentiary hearing held on May 6, 2005, Defendant's trial counsel Alan Chipperfield and Lewis Buzzell testified regarding the instant claim. Mr. Chipperfield testified that he did not remember his thought process at the time but that he is not sure that the comments by the State during voir dire that Defendant complaints of were objectionable. (Exhibit "B," pages 6-7). Mr. Buzzell testified that he did not recall Mr. Chipperfield objecting to the State's comments and that the one sentence that Defendant has focused on is taken out of context and the rest of the statement surrounding it is a correct statement of the law. (Exhibit "B," pages 33-34).
>
> The Court specifically finds Mr. Chipperfield's and Mr. Buzzell's testimony was both more credible and more persuasive than Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). The Court finds that the statement actually made by the State was in itself not objectionable. Accordingly, Defendant has failed to establish error on the part of counsel for failing to object

to the State's alleged misstatements of the burden of proof and the presumption of innocence to the jury. Strickland, 466 U.S. 668.

Merits

There was no deficient performance because there was no basis for any objection. This is a correct explanation of the presumption of innocence. Post-conviction counsel seems to mistakenly believe that the presumption is a statement of actual, factual innocence. The presumption of innocence is just that - it is a presumption. A presumption is a burden shifting device. It does not mean that the defendant is actually innocent; rather, it means that the state has the burden of proof. *Griffith v. State*, 976 S.W.2d 241, 246-247 (Tex. App. 1998)(explaining that the presumption of innocence is perhaps better phrased the "assumption of innocence" because "it merely describes the fact that the burden of persuasion and production in a criminal matter are on the prosecution" and "cautions the jury to reach their conclusion solely from the evidence adduced, and not from the fact of arrest or indictment" citing McCormick on Evidence § 342 at 579-80 4th ed. (1992)). So, as trial defense counsel testified, there was no basis to object. Counsel's performance is not deficient for failing to object to an unobjectionable comment. *Julius v. Johnson*, 840 F.2d 1533, 1541 (11th Cir. 1988)(noting that counsel cannot be faulted for his failure to object where counsel had no basis to object).

Moreover, there is no prejudice from defense counsel's failure to object. Regardless of the prosecutor's comments, the jury was properly instructed on both the presumption of innocence and the

reasonable doubt standard of proof by the trial court. The trial court noted, during voir dire that "James Belcher is still presumed to be innocent of the charges" (T. XI 36; T. XII 412). The trial court instructed the jury at the beginning of the trial that "[a]t no time is it the duty of a defendant to prove his innocence." (T. XII 540). At the close of the guilt phase, the trial court instructed the jury on the presumption of innocence (T. XVIII 1382). The trial court explained that:

> ". . . you must presume or believe the defendant is innocent. The presumption stays with the defendant as to each material allegation in the information, through each stage of the trial, unless it has been over come by the evidence to the exclusion of and beyond a reasonable doubt. To overcome the defendant's presumption of innocence, the State has the burden of proving the crime with which the defendant is charged was committed and the defendant is the person who committed the crime. The defendant is not required to present evidence of prove anything.

(T. XVIII 1382). The trial court then explained the concept of "reasonable doubt":

> Whenever the words "reasonable doubt are used, you must consider the following: a reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to return a verdict of not guilty if you have an abiding conviction of guilt. On the other hand, if after carefully considering, comparing and weighing all the evidence there is not an abiding conviction of guilt or if having a conviction it is one which is not stable, but one that wavers and vacillates, then the charge is not proved beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable. It is to the evidence introduced in this trial and to it alone that you are to look for that proof. A reasonable doubt as to the guilt of the defendant may arise from the evidence, conflict ion the evidence of the lack of evidence. It you have a reasonable doubt, you should find the defendant not guilty. If you have no reasonable doubt, you should find the defendant guilty.

(T. XVIII 1382-1383). The jury was properly instructed on both the presumption of innocence and the reasonable doubt standard of

proof. So, there is no prejudice either. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS REGARDING THE JURY'S ROLE IN SENTENCING? (Restated)

Belcher claims that his trial counsels were ineffective for failing to object to the prosecutor's comments which post-conviction counsel asserts minimized the jury's view of its role in capital sentencing in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). IB at 12. The trial court properly denied this claim of ineffectiveness without an evidentiary hearing. This claim did not require an evidentiary hearing because Florida Supreme Court's caselaw establishes that it is meritless as a matter of law. There was no deficient performance because there was no basis for any objection as this Court has repeatedly held. Nor was there any prejudice. The prosecutor's comments correctly described the jury's role in sentencing in Florida. If anything the prosecutor's comments and the trial court's jury instructions inflate, not denigrate, the jury's role in sentencing in Florida. The trial court properly denied this claim.

Trial

During voir dire, the prosecutor, Assistant State Attorney Bernardo De La Rionda, repeatedly informed the jury that there recommendation "carries great weight", (T. XI 126, 146; XIII 451). Defense counsel, Alan Chipperfield, also explained to the prospective jurors, that the judge has to give the jury

recommendation "great weight" and the "he's not entitled to overturn your recommendation unless reasonable people would agree that overturning it is the proper thing to do." (T. XIII 521). Defense counsel also explained that the jurors "should not think, oh, this doesn't really matter, we'll say anything and he'll do the right thing" because the jury recommendation "carries great weight" (T. XIII 521)

Prior to voir dire, the trial court dealt with several preliminary matters, including an objection from the prosecutor regarding the jury's advisory sentencing recommendation, specifically to the statement "and cannot override it unless reasonable men cannot differ on the need to depart from the recommendation." (T. XI 8). The prosecutor agreed that that was the law but noted that "it is not part of the required instructions that are provided by and have been approved by the Florida Supreme Court, so I don't think the jury has to be told that". The trial court then ruled that he would give the instruction requested by the defense because Judge Schaffer advises that trial court give this particular instruction when requested even though the Court has not required it. (T. XI 9-10). The trial court then granted the defense counsel requested jury instruction since it was an accurate statement of the law. (T. XI 10). The trial court then instructed the prospective jurors prior to voir dire, that "I am not required to follow the advisory sentencing recommendation of the jury. However, I am required to assign great weight to your recommendation and cannot override it unless reasonable men would not differ on the need to depart from the recommendation." (T. XI

36). The trial court repeated the special jury instruction requested by defense counsel to the second panel of prospective jurors. (T. XIII 411). During jury selection, defense counsel referred to a prior "motion to prohibit misleading references to the advisory role of a jury in sentencing." (T. XII 390). The trial court ruled that the motion was moot because he had agreed to give defense counsel voir dire instruction on the proper role of the jury. (T. XII 391). Defense counsel asserted that it was not moot because the motion concerned the prosecutor's comments, not the judge's instructions. The trial court then denied the motion because he had given the requested instruction.(T. XII 392-393). The trial court did not think it was necessary every time the lawyers talk about the jury's role, that the instruction be reread to the jury.

The trial court's ruling

> In claim two, Defendant asserts that counsel rendered ineffective assistance by allowing comments diminishing the role of the jury to be made by the State. Defendant argues that the State diminished the jury's sense of responsibility in deciding whether Defendant should be sentenced to death by commenting that the jury's recommendation was merely advisory in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Defendant cites to three instances during voir dire where the State told the prospective jurors that the jury's recommendation carried "great weight." (Defendant's Motion at 5). Defendant further cites to the State's closing argument during the guilt phase as an instance of diminishing the jury's role to which counsel should have objected. (Defendant's Motion at 5).
>
> Initially, the Court notes that prior to the commencement of voir dire, the Court granted the defense's request to instruct the voir dire panels that the Court cannot override the jury's advisory sentencing recommendation unless reasonable men cannot differ on the need to depart from the recommendation. (R.O.A. Vol. XI pages 8-10). This Court instructed both voir dire panels that "I am not required to

> follow the advisory sentencing recommendation of the jury. However, I am required to assign great weight to your recommendation and cannot override it unless reasonable men would not differ on the need to depart from the recommendation." (R.O.A. Vol. XI, page 36, Vol. XIII, page 411). The penalty phase instructions given in the instant case were the standard penalty phase instructions. The Florida Supreme Court has held that Florida's standard penalty-phase jury instructions do not violate Caldwell. Thomas v. State, 838 So.2d 535 (Fla. 2003); Combs v. State, 525 So.2d 853 (Fla. 1988). Accordingly, counsel cannot be deemed ineffective for failing to object to the instances the State commented that the jury's recommendation carried great weight. Teffeteller v. Dugger, 734 So.2d 1009 (Fla. 1999).

Merits

First, counsel cannot be ineffective for failing to do something that, in fact, he did do. Defense counsel filed a motion entitled "motion to prohibit misleading references to the advisory role of a jury in sentencing" but the motion was denied by the trial court. The trial court denied the motion because he had instructed the jury that he would accord the jury recommendation great weight and only override it if it was unreasonable.

Furthermore, any such objection is meritless. The Florida Supreme Court has consistently held that counsel cannot be deem ineffective for failing to convince the Court to rule in his favor. *Cf. Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting a claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance). The Florida Supreme Court has rejected a very similar claim of a *Caldwell* violation. *State v. Duncan,* 894

So.2d 817, 831 (Fla. 2004)(rejecting a claim that judge's instruction of "as you've been told, the final decision as to what punishment be [sic] imposed is the responsibility of the judge," violates the mandates of *Caldwell* as "without merit" because the judge's instruction included the standard jury instructions citing Fla. Std. Jury Instr. (Crim.) 7.11. and noting that "[t]his Court has repeatedly held that Florida's standard jury instructions fully advise the jury of the importance of its role and do not violate *Caldwell*." citing *Sochor v. State*, 619 So.2d 285, 291 (Fla. 1993) and *Floyd v. State*, 850 So.2d 383, 404 (Fla. 2002)). Obviously, counsel is not ineffective for being familiar with the controlling caselaw that holds such an objection would be meritless. *Cf. Spencer v. State*, 842 So.2d 52, 74 (Fla. 2003)(observing that appellate counsel will not be considered ineffective for failing to raise issues that have little or no chance of success.).

There is no prejudice. In *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the United States Supreme Court held that the jury must be fully advised of the importance of its role, and neither comments nor instructions may minimize the jury's sense of responsibility for determining the appropriateness of death. However, the United States Supreme Court has clarified *Caldwell* in a subsequent case. *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)(clarifying that *Caldwell* is limited to only to certain types of comments - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision). To establish a *Caldwell* violation,

a defendant must show that the remarks improperly describe the jury's role under state law. *Romano*, 512 U.S. at 9 (citing *Dugger v. Adams*, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) and *Sawyer v. Smith*, 497 U.S. 227, 233, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990)). If the prosecutor's remarks correctly describe the jury's role under local law there is no *Caldwell* violation. *Fleenor v. Anderson*, 171 F.3d 1096, 1100 (7th Cir. 1999)(rejecting a *Caldwell* challenge to the prosecutor's comments that the judge is going to make the final decision because the jury was not told anything that was not true under Indiana law; the judge is not required to give the jury's recommendation weight under the law; and the real objection is not to what the jurors were told, but to Indiana's scheme).

The prosecutor did not denigrate or minimize the jury's role in capital sentencing. He repeatedly informed the jury that their recommendation "carried great weight." Far from denigrating the jury's role in capital sentencing, the prosecutor, if anything, overstated the jury's role. While a jury's recommendation of a life sentence carries great weight and may only be overridden in unique circumstances, a jury's recommendation of death does not. It is only a life recommendation that a judge must accord great weight. *Muhammad v. State*, 782 So.2d 343, 362 (Fla.2001)(explaining that it is only a jury's recommendation of life that should be given "great weight" pursuant to *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) and that "the court not only has the ability but also the duty to lessen its reliance on the jury's verdict if other considerations make the jury's recommendation entitled to less

weight."); *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975)(a jury's recommendation of life should be given great weight and should be followed unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ). A judge is free to ignore a death recommendation from the jury and impose a life sentence. Indeed, double jeopardy principles would preclude the State from even appealing a judge imposing a life sentence, if based on judicial findings, following a jury recommendation of death. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 107, 123 S.Ct. 732, 737, 154 L.Ed.2d 588 (2003)(noting that an "acquittal" of death at a trial-like sentencing phase gives rise to double-jeopardy protections). Such a sentence would unreviewable on appeal. So, a judge is completely free to ignore a death recommendation. The jury in this case thought that their recommendation of either life or death would be accorded great weight, when, in fact, the judge was only required to give great weight to a life recommendation. Regardless of the prosecutor's comments, the jury was instructed by the trial court, that while he not required to follow the advisory sentencing recommendation, he was "required to assign great weight to your recommendation and cannot override it unless reasonable men would not differ on the need to depart from the recommendation." (T. XI 36, XIII 411). Indeed, the jury was instructed in more detail that the current caselaw requires. Both the prosecutor's comments and the judge's instruction inflated, not denigrated, the jury's role. There can be no possibility that the jury took their role more lightly than they should have taken it as required to establish a *Caldwell*

violation. Accordingly, there can be no prejudice from defense counsel not objecting to a comment that inflates, not denigrates, the jury's role. The trial court properly denied this claim following an evidentiary hearing.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM FOR FAILING TO OBJECT TO THE PROSECUTOR'S OMISSION THAT THE STANDARD OF PROOF FOR MITIGATING CIRCUMSTANCES IS THE PREPONDERANCE OF THE EVIDENCE STANDARD? (Restated)

Belcher contends his trial counsels were ineffective for failing to object to the prosecutor not explaining the lower burden of proof regarding mitigators during jury selection. IB at 16. Counsel's performance was not deficient. There was no basis for an objection. While defense counsel may discuss the lower burden if he wishes, he cannot force the prosecutor to do so. Defense counsel does not have this type of control over the prosecutor's remarks. There was no prejudice from the prosecutor's omission. The jury was instructed on the lower burden of proof for mitigators. The trial court properly denied this claim following an evidentiary hearing.

Trial

During jury selection, the prosecutor stated that:

> It is important for all of you to understand that in this type of trial there are two parts of the trial. What I mean by that is you have the first part where you determine whether the stat has proven beyond a reasonable doubt that this defendant whether he is guilty or not guilty and if he is found guilty of murder in the first degree you have to move to the second part and in that part it is what is called the penalty phase.

(T. 144). During jury selection, Defense counsel, Alan Chipperfield, stated to the prospective jurors:

> Aggravating circumstances are certain fact about the crime or about the person who's convicted that under Florida law suggest that death might be an appropriate penalty. And they're all defined by statute and they have to be proven

> beyond a reasonable doubt. Mitigating - do you all understand that? And you'll understand better once we get there. This is sort of just a summary for some of the questions I'm going to ask you. Mitigating circumstances are facts about the crime or about the life and personal characteristics of the person who's convicted which suggest that a life sentence without parole might be appropriate. Do you all think that you can pay attention to mitigating circumstances as well as aggravating circumstances? And they include things like a person's permit, a person's life history, good deeds that a person has done, those sorts of things and they're completely unlimited. They're not defined by statute. They're unlimited. It's whatever facts can be produced which tend to make a life sentence appropriate. Do you all think you can listen to all of those or do you think that after conviction of first degree premeditated, no excuses for murder, that mitigating circumstances just don't make any difference. Anybody feel like that?

(T. XII 220-222).

Evidentiary hearing

At the evidentiary hearing, defense counsel explained that he did not object because he did not think that he could force the prosecutor to talk about mitigation. (EH May at 9). Defense counsel pointed out that the comment did not have anything to do with mitigators; rather, the prosecutor was explaining the two stages of a capital trial. (EH May at 9).

The trial court's ruling

> In ground three, Defendant alleges that counsel rendered ineffective assistance for failing to object and request a curative instruction to the State's voir dire comment which failed to distinguish the defense's lesser burden of proof to establish mitigating circumstances. At the evidentiary hearing held on May 6, 2005, Mr. Chipperfield and Mr. Buzzell testified regarding the instant claim. Mr. Chipperfield testified that he did not recall his thinking back during the trial, but that the State's comment was explaining the two stages of the trial and did not have anything to do with mitigating circumstances. (Exhibit "B," pages 8-9). Mr. Chipperfield testified that he does not believe he could have

> objected and asked the Court to make the State talk about the burden of proving mitigators at that time since the State had not talked about mitigating circumstances. (Exhibit "B," page 9). On cross-examination, Mr. Chipperfield testified that he understood that the State has to prove aggravators "beyond a reasonable doubt" but there is no beyond a reasonable doubt proof requirement for mitigation. (Exhibit "B," page 30).
>
> Mr. Buzzell testified that he did not understand the portion of the State's voir dire quoted by Defendant to say what Defendant characterized it to say. (Exhibit "B," pages 35-36). Mr. Buzzell testified that the defense's voir dire questions where Mr. Chipperfield discussed mitigation is taken out of context by Defendant. (Exhibit "B," pages 36-37). Mr. Buzzell testified that Mr. Chipperfield covered that mitigation does not have to be found beyond a reasonable doubt and that Mr. Chipperfield characterized the long list of things that could be found to be non-statutory mitigation. (Exhibit "B," page 37).
>
> The Court finds that the statement actually made by the State was in itself not objectionable. Further, the Court finds that Mr. Chipperfield's comment during voir dire was not improper. Accordingly, Defendant has failed to establish error on the part of counsel for failing to object to the State's alleged voir dire comment which failed to distinguish the defense's lesser burden of proof to establish mitigating circumstances. Strickland, 466 U.S. 668.

Merits

There is no deficient performance because there was no basis for an objection. Defense counsel cannot make the prosecutor discuss matters the prosecutor does not want to discuss. Defense counsel have no such control over the content of the prosecutor's remarks. Defense counsel is free and did discuss mitigators in his remarks in jury selection but he cannot force the prosecutor to do so.

Defense counsel did NOT tell the prospective jurors that mitigating circumstances must be proven beyond a reasonable doubt. Counsel cannot be ineffective for misstating the law when he, in fact, did not make any such misstatement. Counsel was summarizing the law to provide a basis for the prospective jurors for the purpose of asking questions during the voir dire. He was not

attempting to explain the entire concept mitigating circumstances and their attendant standard of proof. He was doing voir dire, not closing argument in the penalty phase. He was not required to explain every detail regarding mitigating circumstances at this stage of the trial. It is clear from the record that defense counsel's purpose in summarizing the law of mitigating circumstances was to identify prospective juror who did not believe in the entire concept of mitigating circumstances and would vote for death based merely on a conviction for first degree murder. Defense counsel was attempting to identify and strike jurors who had a "no excuses" view of the appropriate penalty for murder. This is perfectly appropriate tactic during jury selection.

Nor is there any prejudice. The concept of mitigation and its attendant standard of proof was explained to the jury during the penalty phase. (T. Vol. 1834). This trial court properly denied this claim following an evidentiary hearing.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR'S QUESTIONS DURING JURY SELECTION REGARDING WEIGHING? (Restated)

Belcher asserts that his trial counsel were ineffective for failing to object to the prosecutor's questions regarding death being the appropriate sentence if aggravating circumstances outweigh mitigating circumstances. IB at 20. Belcher asserts that the prosecutor's questions and a juror's answers during jury selection amounted to a "presumption of death." There is no deficient performance because any such objection would be baseless. This claim is meritless under both this Court's and United States Supreme Court's precedent. This Court has repeatedly rejected any claim that prosecutor's comments or the standard jury instruction shift the burden to the defendant to prove life is the appropriate sentence. The United States Supreme Court has recently held that a state statute allowing a death sentence even if aggravators and mitigators are equal was constitutional. Thus, the trial court properly summarily denied this claim.

Trial

During jury selection, the prosecutor questioned each of the individual jurors about whether "if aggravators outweigh mitigators, . . ., could you recommend that the death penalty be imposed?" (T. XI 148). The prosecutor also asked: "First of all, the State has got to prove the aggravators and then you listen to the mitigators and see if they have been proven and then if the

mitigators don't outweigh that aggravators, could you recommend that Judge Dearing impose the death penalty" (T. XI 149).

During jury selection, defense counsel asked juror Ms. Oldring, how she felt "about the appropriateness of a life sentence for first degree murder" and she responded: "It could happen in certain circumstances. If the defense can make the mitigating circumstances outweigh the aggravating circumstances, then I wouldn't have no problem recommending life as opposed to death, but by the same token, the State aggravating outweighs the mitigating, then I would have no problem imposing a death sentence either. I would keep an open mind." (T. XII 299-300).[8]

The trial court's ruling

> In ground four, Defendant alleges counsel rendered ineffective assistance for failing to object and request a curative instruction to the State's voir dire comment indicating that Defendant has the burden of proving that mitigating circumstances outweigh the aggravating circumstances, rather than vice versa. The record reveals that the penalty phase instructions given in the instant case were the standard penalty phase instructions. The Florida Supreme Court has consistently held that Defendant's burden shifting argument is without merit. Griffin v. State, 866 So.2d 1 (Fla. 2003); Randolph v. State, 853 So.2d 1051, 1067 (Fla. 2003); Floyd v. State, 808 So.2d 175 (Fla. 2002); Demps v. Dugger, 714 So.2d 365, 368 (Fla. 1998); Johnson v. State, 660 So.2d 637, 647 (Fla. 1995). Further, the Court does not find the comments by the State that Defendant complains of were objectionable. (R.O.A. Vol. XI, pages 148-149). Therefore, Defendant has failed to establish error on the part of counsel or prejudice to his defense. Strickland, 466 U.S. 668.

[8] Teresa Oldring was on the final jury (T. XII 377; XIII 528, 532).

Merits

The trial court properly summarily denied this claim. This claim does not require an evidentiary hearing because the Florida Supreme Court's caselaw establishes that it is meritless as a matter of law.

There was no deficient performance. There is nothing objectionable about the prosecutor's questions or juror Oldring's responses. As post-conviction counsel acknowledges, the Florida Supreme Court has repeatedly rejected any claim that prosecutor's comments or the standard jury instruction shift the burden to the defendant to prove life is the appropriate sentence. *Griffin v. State*, 866 So.2d 1, 14 (Fla. 2003)(stating: "We have also repeatedly rejected claims that the standard jury instruction impermissibly shifts the burden to the defense to prove that death is not the appropriate sentence." citing *Sweet v. Moore*, 822 So.2d 1269, 1274 (Fla.2002); *Carroll v. State*, 815 So.2d 601, 622-23 (Fla.2002) and *San Martin v. State*, 705 So.2d 1337, 1350 (Fla.1997); *Asay v. Moore,* 828 So.2d 985, 993 (Fla. 2002)(noting that the "Court has repeatedly rejected the argument that the standard instruction shifted the burden to the to the defendant to prove that a life sentence was appropriate" citing *San Martin v. State*, 705 So.2d 1337, 1350 (Fla.1997) and *Shellito v. State*, 701 So.2d 837, 842 (Fla.1997)); *San Martin v. State*, 705 So.2d 1337, 1350 (Fla.1997) (concluding that weighing provisions in Florida's death penalty statute requiring the jury to determine "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist" and the standard jury

instruction thereon did not unconstitutionally shift the burden to the defendant to prove why he should not be given a death sentence). The prosecutor's comments and the actual juror's response were proper statements of the law according to the Florida Supreme Court and therefore, defense counsel had no basis for an objection. Counsel's performance was not deficient for failing to object to unobjectionable comments.

Post-conviction counsel argues that the issue should be revisited in this case, but a post-conviction case is not the appropriate case to do so. The Florida Supreme Court does not revisit established caselaw in the context of ineffective assistance of counsel claim. *Steinhorst v. Wainwright*, 477 So.2d 537 (Fla. 1985)(noting that the failure to present a novel legal argument not established as meritorious in the jurisdiction of the court to whom one is arguing is simply not ineffectiveness of legal counsel); *Pitts v. Cook*, 923 F.2d 1568, 1574 (11th Cir. 1991)(noting that lawyers rarely, if ever, are required to be innovative to be effective). If counsel followed established caselaw, he was, by definition, effective and that is the only issue before the court in an ineffectiveness claim in post-conviction litigation. If the Florida Supreme Court wishes to revisited their repeated holdings in this area, which they show no inclination to do so, they will do so in a direct appeal case, not this post-conviction case.

Moreover, contrary to Belcher's assertion, neither the prosecutor's question nor the juror's answers amounted to a "presumption of death." Neither discussed what occurred if aggravators and mitigators were equal. Both the questions and the

answer assumed that either aggravators would outweigh mitigators or vice versa. Equipose was not discussed. Neither the questions nor the answer reflect a presumption of death.

Belcher's reliance on *Jackson v. Dugger*, 837 F.2d 1469, 1473-1474 (11th Cir. 1988), is misplaced. IB at 22,23. The Eleventh Circuit held that a presumption that death was the appropriate sentence when there are one or more valid aggravating factors in the absence of any mitigating factors, violated the individualized sentencing determination required by the Eighth Amendment. However, recently, the United States Supreme Court, in *Kansas v. Marsh*, - U.S. -, 2006 WL 1725515 (June 26, 2006), held that Kansas' death penalty statute, which mandated the death penalty even if jury found aggravating and mitigating circumstances weighed equally, did not violate the Eighth Amendment. The *Marsh* Court explained that a death penalty statute may place the burden on the defendant to prove that the mitigating circumstances outweigh aggravating circumstances. As long as a state's death penalty statute narrows the class and does not preclude the sentencer from considering relevant mitigating evidence, that statute does not violate the Eighth Amendment. Florida's death penalty statute not only requires the aggravators outweigh mitigators, unlike Kansas', but like Kansas' statute, Florida's statute narrows the class and does not preclude the sentencer from considering relevant mitigating evidence. If Kansas' death penalty statute, which allows a death sentence when there is equipose between aggravators and mitigators, is constitutional, as the United States Supreme Court recently held, then Florida's death penalty statute, which

does not have a equipose concept, certainly is constitutional as well. The Eleventh Circuit's holding otherwise in *Jackson*, regarding a presumption of death, has been overruled by the United State Supreme Court in *Marsh*. The trial court properly summarily denied this claim.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR'S COMMENTS REGARDING PREMEDIATION? (Restated)

Belcher asserts that his trial lawyers were ineffective for failing to object to the prosecutor's comments regarding premeditated murder. IB at 24. There was no deficient performance because there was no basis to objection. The prosecutor's comments regarding premeditation were correct statements of the law. Moreover, there was no prejudice. The jury was properly instructed on the concept of premeditation. Thus, the trial court properly denied the claim.

Trial

During jury selection, the prosecutor was discussing the two theories of first degree murder - premeditated murder and felony murder. (T. XI 166). He explained that "killing with premeditation is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between formation in the mind of the premeditated intent to kill and the actual killing." (T. XI 166). He also explained that: "There doesn't have to be an exact period of time. The premeditated intent to kill must be formed before the killing. And the question of premeditation is a question of fact to be determined by you from the evidence" (T. XI 167). The prosecutor noted that: "It will be sufficient proof of premeditation if the circumstances of the

killing convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing. That was written, obviously, by a lawyer. Let me hopefully tell you in common everyday language, not legalese. Do you all understand that there doesn't have to be an exact period of time. It's not like an Agatha Christie book. I don't have to think about it for months or years." (T. XI 167).

During closing of the guilt phase, the prosecutor again explained the concept of premeditation. (T. XVIII 1345-1346). The prosecutor was using a chart. The chart probably had the elements of murder on it including the element that the victim is dead. The prosecutor stated: "One is called premeditated murder and the other is known as felony murder. And the bottom line in terms of proving beyond a reasonable doubt is that she is dead. There is no dispute about that. That the death was caused by the criminal act of James Bernard Belcher. There's no dispute about that." (T. XVIII 1345-1346). The prosecutor also referred to his prior description of the concept of premeditation: "Well, for premeditation, we covered that in jury selection, here's what's required. There was a conscious decision to kill. The decision must be present in the mind at the time the act was committed and as you recall, the law doesn't fix the exact period of time that must pass between the formation of the premeditated intent to kill and the actual act. <u>This must be long enough for reflection.</u> And the question of premeditation is a question of fact to be determined by you from the evidence and it will be sufficient proof of premeditation if the circumstances of the attempted killing and the conduct of the

accused convince you beyond a reasonable doubt." (T. XVIII 1346-1347).

Evidentiary hearing

At the evidentiary hearing, defense counsel explained but that he did not hear anything that was not out of the standard instruction. (EH May at 11-13). He explained that premeditation requires two things reflection followed by a decision. (EH May at 13). Defense counsel stated that he did not believe that there was any grounds to object to the prosecutor's closing argument regarding the statement that the victim was dead. (EH May at 15-16). There was no dispute about the victim being dead. (EH May at 16).

The trial court's ruling

> In ground five, Defendant alleges that counsel rendered ineffective assistance for failing to object and request a curative instruction to the State's comments indicating that a killing done instantly after deciding to kill is Premeditated First Degree Murder. At the evidentiary hearing held on May 6, 2006, Mr. Chipperfield and Mr. Buzzell testified regarding this claim. Mr. Chipperfield testified that the first comment by the State addressed at the hearing did not contain the word "instantly" as alleged and if it had he might have objected. (Exhibit "B," pages 10-12). Mr. Chipperfield testified that he believes that the State's comment was right out of the instruction. (Exhibit "B," page 12). Mr. Chipperfield testified that the second comment by the State addressed at the hearing contained the requirements of the jury instruction: reflection followed by a decision. (Exhibit "B," pages 12-13). Mr. Chipperfield testified that the third comment by the State, which occurred during closing arguments, was not objectionable since the victim was dead and the defense had conceded that the victim was dead. (Exhibit "B," pages 13-16). Mr. Buzzell testified concerning the State's first comment raised by Defendant that while the State did not repeat the part of the jury instruction that there must be time for reflection, the statement made by the

> State was not an incorrect statement of the law. (Exhibit "B," pages 37-40). Mr. Buzzell testified that at most the State's comment was an incomplete statement. (Exhibit "B," page 40).
>
> The Court specifically finds Mr. Chipperfield's and Mr. Buzzell's testimony was both more credible and more persuasive than Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). The Court finds that the statements actually made by the State were in themselves not objectionable. Accordingly, Defendant has failed to establish error on the part of counsel for failing to object to the State's alleged comments indicating that a killing done instantly after deciding to kill is Premeditated First Degree Murder. Strickland, 466 U.S. 668.

Merits

There was deficient performance. There was no basis for any objection. The prosecutor's statements are correct statements of the law regarding the concept of premeditation. *Standard Jury Instructions in Criminal Cases* (97-1), 697 So.2d 84, 97 (Fla. 1997)(defining premeditation as: "Killing with premeditation" is killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing. The question of premeditation is a question of fact to be determined by you from the evidence. It will be sufficient proof of premeditation if the circumstances of the killing and the conduct of the accused convince you beyond a reasonable doubt of the existence of premeditation at the time of the killing). The prosecutor's comments included a statement that reflection was required. Defense counsel is not ineffective for failing to object to correct

statements of the law. As the trial court found, "the statements actually made by the State were in themselves not objectionable."

The Florida Supreme Court has rejected a similar claim of ineffectiveness without an evidentiary hearing where the prosecutor included reflection in the definition of premeditation, as the prosecutor did here, and where the jury was properly instructed on premeditation, as the jury was here. *State v. Williams*, 797 So.2d 1235, 1241 (Fla. 2001)(affirming a summary denial of an ineffectiveness claim for failing to object to the State's improper definition of premeditation where the prosecutor stated: "Anytime anybody takes a gun, a .38 caliber gun and shoots another person in the head, that is premeditated.").

Belcher's reliance on *Waters v. State*, 486 So.2d 614, 616 (Fla. 5th DCA 1986), is misplaced. IB at 29,31. *Waters* is a Fifth District case that this Court has distinguished. *State v. Williams*, 797 So.2d 1235, 1242 (Fla. 2001)(distinguishing *Waters* where the State did refer to the element of reflection in its closing argument and where the trial court properly instructed the jury on the definition of premeditation and finding that the trial court did not err in denying the defendant an evidentiary hearing on this issue). Here, as in *Williams*, the prosecutor referred to the element of reflection required to establish premeditation; but, here, unlike, *Williams*, the trial court granted the defendant an evidentiary hearing on this issue. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED A CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECTION TO THE PROSECUTOR'S COMMENTS REGARDING MOTIVE? (Restated)

Belcher claims that his trial counsels were ineffective for not objecting to the prosecutor's comment regarding motive. IB at 32. There was no deficient performance because there was no basis for any objection. The prosecutor's comment that the prosecution does not have to prove motive was an accurate statement of the law. There was no prejudice either. The jury was properly instructed on premeditation. The trial court properly summarily denied this claim.

Trial

During jury selection, the prosecutor stated:

> Do all of you understand that the State doesn't have to prove motive? You know sometimes in books or on TV everybody is talking about what was the motive. The State does not have to prove motive.

(T. XI 169).

During jury selection, the prosecutor also stated:

> Do all of you understand that sometimes on TV or in books, you know, they've got motive. Here was the motive. That the State doesn't have to prove motive in any murder. Do all of you understand that?

(T. XIII 469).

The trial court's ruling

> In ground six, Defendant alleges that counsel rendered ineffective assistance for failing to object and request a curative instruction to the State's comment that suggested the State does not have to prove intent for First Degree

Premeditated Murder. Defendant argues that the State's statement that it did not have to prove motive suggested to the jury that the State did not have to prove intent to kill. The first comment Defendant complains of was:

> Do all of you understand that the State doesn't have to prove motive? You know sometimes in books or on TV everybody is talking about what was the motive. The State does not have to prove motive.

(R.O.A. Vol. XI, page 169). The State Attorney's second comment Defendant complains of was:

> Do all of you understand that sometimes on TV or in books, you know, they've got motive. Here was the motive. That the State doesn't have to prove motive in any murder. Do all of you understand that?

(R.O.A. Vol. XIII, page 469).

Motive for a murder "is not an essential element of the crime of first degree murder and a person may be convicted of this crime even if no motive is established." Bedova v. State, 779 So.2d 574, 578 (Fla. 5th DCA 2001). The lack of motive does not prevent proof of premeditation. Daniels v. State, 108 So.2d 755 (Fla. 1959). The Court finds that the State's comments that it did not have to prove a motive for the victim's murder did not suggest to the jury that the State did not have to prove that Defendant had an intent to kill the victim. Accordingly, Defendant has failed to establish error on the part of counsel or prejudice to his case. Strickland, 466 U.S. 668.

Merits

This claim did not require an evidentiary hearing because the trial court record conclusively refutes this claim of ineffectiveness and Florida Supreme Court caselaw establishes that motive is not a required element.

There was no deficient performance. The prosecutor's statement that the State is not required to prove motive is a correct statement of the law. *Bedoya v. State*, 779 So.2d 574, 578 (Fla. 5th DCA 2001)(noting that motive is not an essential element of the crime of first degree murder and a person may be convicted of this

crime even if no motive is established); *Daniels v. State*, 108 So.2d 755 (Fla. 1959)(observing that lack of motive does not prevent proof of premeditated homicide); *Matthews v. State* , 130 Fla. 53, 60, 177 So. 321, 325 (Fla. 1937)(concluding that while the existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer; "motive is not an essential element of the crime, nor is it indispensable to a conviction of the person charged with its commission."). There was no basis for defense counsel to objection. As the trial court found, "the State's comments that it did not have to prove a motive for the victim's murder did not suggest to the jury that the State did not have to prove that Defendant had an intent to kill the victim." Defense counsel is not ineffective for failing to object to correct statements of the law.

There was no prejudice. The jury was properly instructed on premeditation. Furthermore, the prosecution did, in fact, establish a motive for this murder. Thus, the trial court properly summarily denied the claim.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR CONCEDING THAT A SEXUAL BATTERY OCCURRED? (Restated)

Belcher claims that his trial counsels were ineffective for conceding facts in violation of *Nixon v. Singletary*, 758 So.2d 618 (Fla. 2000)(*Nixon II*), and *Nixon v. State*, 857 So.2d 172 (Fla. 2003) (*Nixon III*). IB at 38. *Nixon* claims are now governed by the *Strickland* standard. There is no deficient performance or prejudice. Trial counsel did not concede that Belcher was perpetrator. Trial counsel merely conceded that the victim was dead. This is not the type of "concession" covered *Nixon*. A true *Nixon* claim requires that counsel concede, not that a crime occurred, but that his client was the perpetrator of that crime. Defense counsel disputed the identity of the perpetrator. Nor was there any prejudice. A mere concession that a crime occurred, but the defendant did not commit the crime does not harm a defendant. So, there was no prejudice. The trial court properly denied this claim following an evidentiary hearing.

Trial

During opening statements of the guilt phase, Lewis Buzzell, admitted that there were some facts that were not disputed: "obviously, and quite tragically, Ms. Embry is dead." (T. XIII 565). He then explained that "the ultimate question for you, which is who did it" (T. 566). He argued that while "the State may actually have proved several things, a lot of things, and yet they

will not prove beyond a reasonable doubt that James Belcher was the person who did this" (T. XIII 567).

Evidentiary hearing

Defense counsel did not agree that conceding that there was a murder was implicitly conceding that there was a rape. (EH May at 19). Their theory was that "our client had consensual sex and didn't commit a sexual battery" and that "someone else committed the murder possibly along with a sexual battery." (EH May at 19). Lewis Buzzell testified that he did not think that telling the jury that the only real issue was the identity of the perpetrator that the jury would assume that was a concession that a sexual battery occurred. (EH May at 42). His defense was that Belcher did not do it which encompassed both the murder and the rape. (EH May at 42).

The trial court's ruling

> In ground seven, Defendant asserts that counsel rendered ineffective assistance by conceding that the victim suffered a sexual battery, the predicate offense needed for a Felony First Degree Murder conviction. Mr. Chipperfield testified at the May 6, 2005, evidentiary hearing concerning this allegation. Mr. Chipperfield testified that the only real issue at trial was the identity of the perpetrator. (Exhibit "B," page 19). Mr. Chipperfield testified that the defense's theory at trial was that Defendant had consensual sex with the victim, not sexual battery, and that someone else committed the murder and possibly a sexual battery. (Exhibit "B," page 19).
>
> Mr. Buzzell testified at the May 6, 2005, hearing regarding the allegation of conceding the victim suffered a sexual battery. Mr. Buzzell testified that telling the jury that the only real issue is the identity of the perpetrator was not a concession that Defendant committed a sexual battery. (Exhibit "B," page 40-42). Mr. Buzzell testified that the defense was that Defendant did not commit the sexual battery or first degree murder. (Exhibit "B," page 43). On cross-examination, Mr. Buzzell testified that the defense's

> overall approach at trial was to distance Defendant's DNA from the time of the victim's death and the time of her injuries as much as possible. (Exhibit "B," page 52).
>
> The Court specifically finds Mr. Chipperfield's and Mr. Buzzell's testimony was both more credible and more persuasive than Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). The Court finds that defense counsel did not concede that the sexual battery had occurred. Counsel's defense was that Defendant was not the person who committed these crimes. Counsel's theory was that Defendant had consensual sex with the victim at some time other than the time of the murder and possible sexual battery and so their failure to specifically contest that this was a murder and sexual battery did not constitute a concession on counsel's part about anything relevant to their defense. The Court finds defense counsel did not specifically concede that any crime, especially sexual battery, had occurred. Accordingly, Defendant has failed to establish error on the part of counsel or prejudice to his case. Strickland, 466 U.S. 668.

Merits

First, a "concession" that the crime occurred or that the victim is dead is not a true *Nixon* claim. Where counsel acknowledges that the crime occurred but argues that the defendant is not the perpetrator, that is not a concession as envisioned by *Nixon II or Nixon III.* A true *Nixon* claim requires that counsel concede that the defendant is the perpetrator to the charged crime.

More importantly, *Nixon* is no longer good law. The Florida Supreme Court's *Nixon* decision was overruled by the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004)(holding that a concession of guilt is governed by *Strickland*, not *Cronic* and that while an attorney has a duty to consult, he is not required to obtain the defendant's express consent to a concession of guilt). The *Nixon* Court held:

> When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's

> explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Florida v. Nixon, 543 U.S. at 192, 125 S.Ct. at 563; see also *Philmore v. State*, 2006 WL 1641932, *7 (Fla. June 15, 2006)(quoting this passage and acknowledging that this Court's requirement in *Nixon* that a defendant must affirmatively and explicitly agree to a strategy to concede guilt was overruled by *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 563, 160 L.Ed.2d 565 (2004)). So, Belcher may only raise this claim as a *Strickland* claim. *Nixon v. State,* 2006 WL 1027135, *4 (Fla. April 20, 2006)(explaining that to obtain relief based on ineffective assistance of counsel for conceding guilt without the defendant's consent, the defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance as required under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and concluding that trial counsel's strategy of conceding guilt because the evidence demonstrated Nixon's guilt and focusing instead on the penalty phase to avoid a death sentence was a reasonable trial strategy and therefore, counsel's performance was not deficient); *Harvey v. State*, 2006 WL 1641961 (Fla. June 15, 2006)(holding that trial counsel's opening statement during guilt phase, where he said: "I have been doing defense work for some time. I've never said that in a court of law, that my client is guilty of murder. But he is", was effectively conceding defendant's guilt of first-degree murder but did not prejudice defendant and, thus, did not amount to ineffective assistance.).

There was no deficient performance. As trial counsel explained, they argued that the defendant was not the perpetrator. Their theory was that "our client had consensual sex and didn't commit a sexual battery" and that "someone else committed the murder possibly along with a sexual battery." (EH May at 19). Defense counsel merely conceded that the victim was dead. If defense counsel had denied that the victim was dead, the State could well have obtained the actual body from the cemetery and presented the actual corpse to the jury. Obviously, no defense counsel wants to dispute the fact the victim is dead when the State has recovered the body. Such a defense is likely to provoke the prosecutor to truly prove the victim is dead. It was reasonable trial strategy to conceded that the victim was dead.

Moreover, there was no prejudice. Conceding that the victim was murdered, but by another person, does not harm a defendant. Regardless of counsel's argument, the jury would have convicted Belcher based on the DNA evidence. *Patton v. State*, 784 So.2d 380 (Fla. 2000)(finding the facts counsel conceded were supported by overwhelming evidence and even if counsel had denied these facts, there was no reasonable possibility the jury would have rendered a different verdict). The trial court properly denied this claim following an evidentiary hearing.

ISSUE VIII

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR NOT OBJECTING TO VICTIM IMPACT EVIDENCE? (Restated)

Belcher contends that his trial counsels were ineffective for allowing victim impact evidence during the guilt phase and emotional appeals to the jury. IB at 43. There was no deficient performance. Trial counsel did object to the brother's testimony and on the ground that it was victim impact evidence. Furthermore, there is no prejudice. The prosecutor withdrew the question. The trial court properly summarily denied this claim.

Trial

During the guilt phase, the victim's brother, who had found the victim, was explaining that the victim kept her door locked. (T. XIII 574). Her brother testified that the victim was attending school and working two jobs. The prosecutor observed that the victim was "pretty ambitious, I guess, to use my words in terms of, I guess, she went to school and had two jobs?" (T. XIII 575). Before the witness could answer, Defense counsel, Mr. Buzzell, immediately objected that the prosecutor was "getting into really victim impact testimony here." (T. XIII 575). Defense counsel argued that this was "describing her character by being ambitious, that's completely irrelevant and what it does is create sympathy or lend sympathy to her. (T. XIII 576). The prosecutor withdrew the question. (T. XIII 576-577). The prosecutor asked about the victim's housekeeping habits. (T. XIII 578). The brother testified that she was "very neat" (T. XIII 578).

During the guilt phase, the victim's brother identified several photographs of the victim's house. When the prosecutor started to have the witness Rick Embry identify Ex. J and K, which depicted the victim's body inside the bathtub, defense counsel asked to look at them first. (T. XIII 588). Defense counsel objected that they were prejudicial especially having the victim's brother identify them. (T. XIII 588-589). The prosecutor argued the photographs showed the position the victim was found in. (T. XIII 590). The prosecutor noted that the State cannot help it if the victim's brother is the one who finds the body. (T. XIII 590). The trial court overruled the objection provided that the brother did not exhibits any "strong emotional response". (T. XIII 591-592).

During the guilt phase, Officer O'Bryant, who is an evidence tech with the JSO, who assisted Officer Parker with the photographs of the crime scene, testified regarding taking the photographs. (T. XIV 607). The prosecutor introduced State Ex. R and S which depicted the victim's body after she was removed from the bathtub and placed on a plastic sheet. (T. XIV 627-628). Ex. S depicted the victim's upper shoulder and head. (T. XIV 628). Defense counsel, Mr. Buzzell, objected that the photographs were not relevant and that any value was outweighed by prejudicial value and that the photographs were cumulative of the photographs of the victim in the tub. (T. XIV 629). The prosecutor argued that the photographs were relevant because the "whole point of this trial is going to literally come down to the DNA." (T. XIV 630). The prosecutor explained that the point of the photographs was to establish that the DNA on the slippers was not disturbed when the

medical examiner removed the body from the tub because they used a plastic sheet. (T. XIV 631). The prosecutor argued, as the Ex. S which depicted the victim's upper shoulder and head, would probably be used by the medical examiner to testify as to the manner of death. (T. XIV 632). The trial court asked defense counsel if he was going to contend that the slippers were contaminated when the victim was removed from the tub and defense counsel refused to answer because he was "not at liberty to disclose what our strategy would be in that regard." (T. XIV 632). The trial court overruled the objection as to Ex. R but sustained the objection as to Ex. S. (T. XIV 632-633). The trial court ruled that if Ex. S becomes relevant because of the medical examiner testimony, the State could renew its request to introduce it at that time. (T. XIV 633). Then, Ex. R was published to the jury. (T. XIV 633).

During the penalty phase, the State presented four witnesses. Three of the four witness were victim impact witnesses. Jennifer's father, Martin Embry, Sr., her best friend, Carol Thomas and her brother, Ricky Embry, who all testified as to their loss. (T. XX 1545-1547, 1548-1549, 1550-1553). Her brother also testified regarding the emotional trauma of finding the body of his dead sister. (T. XX 1552).

The trial court's ruling

> In ground eight, Defendant alleges that counsel rendered ineffective assistance by permitting impermissible appeals to the emotions and sympathy of the jurors. The first instance of appealing to the emotions and sympathy of the jurors Defendant cites to is the testimony of the victim's brother,

Ricky Embry. Mr. Embry testified at trial that he had a close relationship with his sister and that his looking out for her was why he was the individual to discover her body. (R.O.A. Vol. XIII, pages 571-574). During the questioning by the State of Mr. Embry concerning his sister attending school and working two jobs, Mr. Buzzell specifically objected to this line of questioning as victim impact testimony intended to create or lend sympathy to the victim and the State withdrew its question. (R.O.A. Vol. XIII, pages 575-577). Finally, Mr. Embry's testimony regarding the victim's housekeeping habits was relevant to the issue of Defendant's DNA found on the victim's bathroom slippers. (R.O.A. Vol. XIII, page 578).

The second instance Defendant cites to are photographs of the victim offered into evidence by the State. The State offered into evidence photographs of the victim's body in the bathtub through Mr. Embry's testimony. (R.O.A. Vol. XIII, page 588). Mr. Buzzell objected to the introduction of these photographs as being prejudicial by having the victim's brother identify them, but was overruled by the Court. (R.O.A. Vol. XIII, pages 588-592). The State also offered two photographs (State's Exhibits "R" and "S") of the victim after she was removed from the bathtub into evidence through the testimony of Officer O'Bryant. (R.O.A. Vol. XIV, pages 627-628). Mr. Buzzell objected to the introduction of these photographs as not relevant and prejudicial in nature. (R.O.A. Vol. XIV, pages 629-632). The Court sustained counsel's objection as to State's Exhibit "S," but overruled counsel's objection as to State's Exhibit "R." (R.O.A. Vol. XIV, pages 632-633).

The third instance of appealing to the emotions and sympathy of the jurors Defendant cites to is the State's guilt phase closing argument. Initially, this Court notes that wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880 (1962), cert. denied, 372 U.S. 904 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The standard for review of prosecutorial misconduct is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb v. State, 376 So.2d 230, 232 (Fla. 1979). Jones v. State, 612 so.2d 1370 (Fla. 1993); State v. Murphy, 443 So.2d 955 (Fla. 1984). The comments by the prosecutor, of which Defendant complains, did not rise to the level of vitiating the entire trial. (R.O.A. Vol. XVIII, pages 1318, 1330, Vol. XX, page 1553). Moreover, the comments by the prosecutor did not "'inflame the minds and passions of the jurors so that their verdict reflect[ed] an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.'" Jones v. State, 612 So.2d 1370, 1374 (Fla. 1993), quoting Bertolotti v. State, 476 So.2d 130 (Fla. 1985). As counsel objected to both the

> testimony of Mr. Embry and the introduction of photographs of the victim, and the State's closing argument would not have inflamed the minds and passions of the jury, Defendant has not established that counsel erroneously allowed impermissible appeals to the emotions and sympathy of the jury. Strickland, 466 U.S. 668.

Merits

First, counsel cannot be ineffective for failing to object to victim impact testimony, when, in fact, he did object. Defense counsel objected immediately to the question, prior to the witness answering it. The prosecutor observed that the victim was "pretty ambitious, I guess, to use my words in terms of, I guess, she went to school and had two jobs?" (T. XIII 575). Before the witness could answer, Defense counsel, Mr. Buzzell, immediately objected that the prosecutor was "getting into really victim impact testimony here." (T. XIII 575). Defense counsel argued that this was "describing her character by being ambitious, that's completely irrelevant and what it does is create sympathy or lend sympathy to her. (T. XIII 576). The prosecutor withdrew the question. (T. XIII 576-577). Nor is there any prejudice. The prosecutor withdrew the question. The jury never heard the answer.

Nor was counsel ineffective for failing to object to the testimony about the victim's habits and attending school. All of this was relevant evidence. The victim habit of locking the door was relevant because there were no signs of forced entry. The victim attending school was relevant because the State introduced evidence that the defendant attempted to contact the victim while she was attending class. The victim's housekeeping habits were

relevant because the bathroom slippers which had the defendant's DNA on them, were found outside the shower.

Nor can be ineffective for failing to object to the photographs, when, in fact, he did object. Defense counsel objected prior to these photographs being published to the jury. The trial court overruled counsel's objections. The Florida Supreme Court has consistently held that counsel cannot be deem ineffective for failing to convince the Court to rule in his favor. *Cf. Rutherford v. Moore*, 774 So. 2d 637, 645 (Fla. 2000)(rejecting a claim of ineffectiveness of appellate counsel for not convincing the Court to rule in his favor on two issues actually raised on direct appeal); *Swafford v. Dugger*, 569 So. 2d 1264, 1266 (Fla. 1990)(finding that if appellate counsel raises an issue, failing to convince this Court to rule in an appellant's favor is not ineffective performance). The trial court properly summarily denied this claim.

ISSUE IX

WHETHER THE TRIAL COURT PROPERLY DENIED THE INEFFECTIVENESS CLAIM FOR FAILING TO PRESENT A DEFENSE MEDICAL EXPERT? (Restated)

Belcher asserts his trial counsel was ineffective for not presenting a defense gynecologist expert to prove that the victim vaginal injuries could have been sustained during consensual sex rather than sexual battery. IB at 48. There was no deficient performance. The expert presented at the evidentiary hearing would not have helped the defense. He agreed that this was a rape and with the state's medical experts findings. Defense counsel are not require to retain their own experts, when they can cross-examine the State's expert to the same effect. There was no prejudice either. The trial court properly denied this claim following an evidentiary hearing.

Trial

The chief medical examiner, Dr. Floro, testified that the victim was strangled and drowned.(T. XIV 640, 643,656). The victim's neck was bruised.(T. XIV 651). Her shoulder was lacerated.(T. XIV 651). Her right eyebrow had bruising and abrasions.(T. XIV 652). The victim's hyoid bone and Adam's apple had hemorrhages which indicted that she was alive when these injuries were inflicted and which are typical of manual strangulation. (T. XIV 653-655). The foam on the victim's mouth is caused by drowning. (T. XIV 656). The victim had bruising in her vaginal area in the hymen and the labia minora. (T. XIV 658,660). The medical examiner recovered semen from the victim. (T. XIV 662,664,665). He testified that the sperm had heads

and tails suggesting the freshness of the specimen. (T. XIV 665). Many had tails but some did not. (T. XIV 669). The sperm could have been deposited three to six days earlier. (T. XIV 6709) The medical examiner's expert opinion was that the victim had been raped. (T. XIV 666).

On cross, Mr. Chipperfield questioned Dr. Floro. (T. XIV 667-676). Defense counsel established that it was possible, because some of the sperm in the victim (less than 50%) did not have tails, the sperm may have been from a person who had sex with the victim three to six days earlier, not at the time of the murder. (T. XIV 670-671). Dr. Floro admitted that he could not tell when the defendant had had sex with the victim. (T. XIV 671). Dr. Floro also admitted that small bruise on the victim's hymen and the half a centimeter laceration to the victim's labial fold could have been a result of "vigorous" sexual intercourse rather than force. (T. XIV 673-674). Dr. Floro admitted that he could not testify that the person the victim had sex with was the same person who caused the victim's injuries. (T. XIV 675). Defense counsel also clarified the medical expert's testimony on direct, establishing that when the medical examiner used the phrase "consistent with", it did not mean that that was the only way something could have happened. (T. XIV 676). Dr. Floro admitted that the tails of the sperm could have been lost while the victim was alive. (T. XIV 680-682). Dr. Floro admitted that he could not tell if the tails of the sperm were lost before the victim was killed or after the victim was murdered and that the time frame could have been three to six

days. (T. XIV 680-682). Mr. Chipperfield cross examined Dr. Floro three times.(T. XIV 667, 678, 680).

Evidentiary hearing

Dr. Bordelin, a gynecologist, testified. (EH April at 7-18). He testified that the injuries to the victim were made by "force" and not the result of "normal activity". (EH April at 11). There was trauma as a result of "some type of forcible injury". While rough consensual sex was a possibility, his opinion was that it was a rape (EH April at 12,15,17). He agreed with the medical examiner's findings who testified at trial (Dr. Floro)(EH April at 15). Dr. Bordelin testified that in his opinion, based on a living patients, that dead sperm only remain 24 hours in a live woman's vagina. (EH April at 12-13). You should not find any evidence of sperm after 24 hours. (EH April at 14). They disappear after 24 hours due to the "normal cleansing mechanism of a live vagina" and "gravity" (EH April at 12-13). He explicitly stated that he could not testify as to how long sperm would remain in a dead person's body. (EH April at 13).

Trial counsel testified that they did not consult a medical expert about rough consensual sex because they expected the State's medical expert to "give us some of what we wanted." (EH May at 20). Lewis Buzzell testified that he was satisfied by the information that he obtained from the medical examiner. (EH May at 43). Some of the medical examiner's opinions were helpful to the defense. (EH May at 44).

The trial court's ruling

In ground nine, Defendant asserts that counsel rendered ineffective assistance by failing to use a defense Gynecologist to counter the State's expert's opinion that the physical evidence shows a forcible sexual battery. At the April 27, 2005, evidentiary hearing, Defendant presented the testimony of Dr. John G. Borderlin to support the instant allegation. Dr. Borderlin testified that based on the materials he reviewed, the victim suffered bruises on her body that were consistent with some type of forcible injury that should not be seen from consensual normal sex. (Exhibit "A," pages 10-11). Dr. Borderlin testified that the trauma to the victim's vaginal area can occur with rough consensual sex. (Exhibit "A," page 12). On cross-examination, Dr. Borderlin testified that he does not dispute Dr. Floro's findings and agrees that there was evidence of sexual battery in this case. (Exhibit "A," page 15). On redirect examination, Dr. Borderlin testified that in his opinion the victim had sex with Defendant within 24 hours of her death and that she had forced sex prior to being murdered. (Exhibit "A," page 16).

At the May 6, 2005, evidentiary hearing, Mr. Chipperfield and Mr. Buzzell testified regarding this allegation. Mr. Chipperfield testified that the defense expected Dr. Floro, the State's medical expert, to give them some of what they wanted at trial, but he did not recall the thought process for not bringing another medical expert into the case. (Exhibit "B," pages 19-20). Mr. Buzzell testified that defense counsel did not present a defense medical doctor because they were satisfied with the information that they obtained from Dr. Floro and that some of his opinions were helpful to their defense. (Exhibit "B," pages 43-44).

The Court specifically finds Mr. Chipperfield's and Mr. Buzzell's testimony was both more credible and more persuasive than Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). The Court finds that Defendant has failed to prove that the calling of a defense medical expert would have helped his case in any way. The medical expert retained by Defendant on this post-conviction motion came to the same conclusion as the medical examiner, that in this case the sex would have been against the victim's will. Dr. Borderlin concluded that the sex was non-consensual when considered in light of the victim's other injuries, and he had no dispute with Dr. Floro's findings and conclusions. Therefore, there would have been no benefit to calling a separate defense expert. Furthermore, defense counsel was satisfied with the testimony they got from Dr. Floro to the extent it helped them in their defense theory of the case. Accordingly, Defendant has failed to establish error on the part of counsel or prejudice to his case. Strickland, 466 U.S. 668.

Merits

There was no deficient performance. Dr. Borderlin is not a medical examiner. His opinion regarding sperm are based on his experience with live victims of rape. The murder victim was not live - she was dead. He did not and could not testify as to length of time that dead sperm remain in a murder victim in a bathtub. Both his explanations as to why the sperm disappear - the "normal cleansing mechanism" and "gravity" - do not apply to a immobile dead victim. His testimony would have been either excluded as not relevant because of his lack of expertise in the area of dead women victims or impeached with the fact that he was not a pathologist and could not testify as a forensic pathologist about the existence of sperm in a dead woman located in a bathtub.

Defense counsel are not require to retain their own experts, when they can cross-examine the State's expert to the same effect. *Reed v. State*, 875 So.2d 415, 427 (Fla. 2004)(rejecting a claim of ineffective for failing to retain a defense expert because retaining an independent expert was unnecessary where defense counsel rigorously cross-examined the State expert to establish the facts necessary to the defense). Counsel accomplished this defense goal through his cross of the State's medical examiner, Dr. Floro. Trial counsel achieved the same effect through cross examination of the State's medical expert.

There was no prejudice. This expert would not have helped the defense. The expert presented at the evidentiary hearing did not dispute the State's medical examiner findings nor the basic fact that the victim's injuries were more likely a result of the victim

being raped than a result of rough sex. He agreed that this was a rape and with the state's medical expert's findings. As the trial court found, "[d]efendant has failed to prove that the calling of a defense medical expert would have helped his case in any way. The medical expert retained by Defendant on this post-conviction motion came to the same conclusion as the medical examiner, that in this case the sex would have been against the victim's will. Dr. Borderlin concluded that the sex was non-consensual when considered in light of the victim's other injuries, and he had no dispute with Dr. Floro's findings and conclusions." There was no prejudice from the failure to retain a defense medical expert. The trial court properly denied this claim following an evidentiary hearing.

ISSUE X

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO THE PROSECUTOR'S QUESTIONS REGARDING PRISON CONDITIONS? (Restated)

Belcher asserts that trial counsel were ineffective for failing to object to the testimony of the inmates that they are allowed to watch television and play basketball while incarcerated because it amounts to non-statutory aggravation. IB at 55. There was no deficient performance. Defense counsel responded rather than objecting. This is a reasonable strategic decision. This is not non-statutory aggravation. As Defense counsel testified, it was worth presenting the inmates' testimony regardless of the prosecutor's attempt to cross on prison conditions because the judge found the testimony regarding the defendant being helpful to the inmates as a mitigator. The trial court properly denied this claim following an evidentiary hearing.

Penalty phase

During penalty phase, defense counsel presented the testimony of Stephanie Cook, who was a literacy coordinator at Appalachee Correctional Institution, who testified that Belcher was her educational aide and encouraged other inmates to participate. (T. XXI 1627-1663). The prosecutor's cross-examination of her included the number of TVs inmates have in prison; that they are not handcuffed; whether inmates have french toast for breakfast, get grits, eggs, and baked chicken; are allowed to have radios, play softball, basketball, weight-lifting and volleyball; some inmates are allowed to work outside the prison; are allowed visitors and

are allowed outside. (T. XXI 1651-1656). Defense counsel did not object. However, on redirect, Mr. Chipperfield, whether anyone vacationed at the prison; that there was no choice for breakfast; that the inmates are kept within the prison walls; they get their gain time forfeited as punishment; that prison was not a "nice place"; that individual inmate do not get their choice of what they watch on the TV; that prison is surround by razor wire. (T. XXI 1657-1659). On recross, the prosecutor asked about escapes from prison. (T. XXI 1661). Defense counsel elicited testimony from her that an inmate with a life sentence does not get gain time and established that an inmate with a life sentence serves it until he dies. (T. XXI 1662).

Defense counsel also presented, during the penalty phase, the testimony of five inmates or former inmates, Robert Hiers, Michael Suggs, Alfonzo Smalls, Dwayne Hayes and Destin Turner, all of whom testified that Belcher helped them in various ways, such as being a tutor and coach while they were in prison. (T. XXI 1666-1762). The prosecutor cross-examine inmate Michael Suggs, that the inmates were not handcuffed; ability to enjoy the sunshine; ability to play basketball and softball; watch T.V.; go outside; what they eat and visitation. (T. XXI 1695-1703). Defense counsel on redirect established that the inmate had never meet another inmate who would rather be in prison than free. (T. XXI 1710).

Evidentiary hearing

Defense counsel did not object to the comments because he thought "it was silly" and that "the jury would see through it."

(EH May at 21). Defense counsel had planned to ask the inmates that he presented what freedom they had in prison. He thought that they "made it pretty obvious that prison was not a good place". Lewis Buzzell testified did not think the prosecutor's attempt to present a different side to prison worked too well. (EH May at 45). Lewis Buzzell testified it was worth presenting the inmates' testimony regardless of the prosecutor's attempt because the judge found the testimony regarding the defendant being helpful to the inmates as a mitigator. (EH May at 45).

The trial court's ruling

> In ground ten, Defendant alleges that counsel rendered ineffective assistance for failing to object to non-statutory aggravating circumstances in the form of testimony about the nutritious food, diversions, risk of escape and incurrence of additional taxpayer legal expenses incurred in prison. Mr. Chipperfield testified at the May 6, 2005, evidentiary hearing regarding this claim. Mr. Chipperfield testified that he did not object to the State pointing out on cross-examination of defense witnesses the things that prisoners could do while they were in prison. (Exhibit "B," pages 20-21). Mr. Chipperfield testified that he thought the State's questioning to be silly and the jury would see through it as the defense made it pretty obvious that prison was not a good place and nobody wants to be there. (Exhibit "B," page 21). Mr. Buzzell testified that instead of objecting to the State asking the defense witnesses about prison food, inmates' ability to earn the right to work outside of prison gates, drafting their own legal pleading and writing their own legal documents, Mr. Chipperfield consistently painted a picture of how unpleasant prison was on direct and redirect examination. (Exhibit "B," pages 44-45). Mr. Buzzell testified that he did not believe that the State's questioning worked too well as the Court found mitigation that Defendant had been a positive role model and had helped younger prisoners during his prior incarceration. (Exhibit "B," page 45).
>
> The Court specifically finds Mr. Chipperfield's and Mr. Buzzell's testimony was both more credible and more persuasive than Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). The Court finds that defense counsel adequately dealt with the State's cross-examination of prisoners in the penalty phase regarding life

> in prison. Defense counsel thought that the State's points were foolish and that they could adequately demonstrate that life in prison was unpleasant. The Court finds nothing objectionable about the State's questions to the prisoners called by Defendant as mitigation witnesses in the penalty phase. Accordingly, Defendant has failed to establish error on the part of counsel or prejudice to his case. Strickland, 466 U.S. 668.

Merits

There is no deficient performance. Defense counsel chose to rebut the prosecutor's view of prison rather than object. This is trial strategy. *Asay v. State*, 769 So.2d 974, 984 (Fla.2000) ("[T]he defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy."). Trial counsel thought the argument was silly. Trial counsel is not required to object to argument that, in his view, are silly.

The Florida Supreme Court has rejected a similar claim of ineffectiveness. In *Brown v. State*, 755 So.2d 616, 623 (Fla. 2000), the Florida Supreme Court concluded that defense counsel was not ineffective for failing to object to penalty-phase closing argument by prosecutor that described positive aspects of life in prison. The prosecutor argued:

> What about life imprisonment, ladies and gentlemen? What about life imprisonment? Now I am not saying that I would like to spend one day in jail, all right, don't get me wrong, but what about life imprisonment? What can one do in prison? You can laugh; you can cry; you can eat; you can sleep; you can participate in sports; you can make friends; you can watch TV; you can read; in short, you live to learn--you live to learn about the wonders that the future holds. In short, it is life.

The Court found no prejudice. The *Brown* Court also found no deficient performance because trial counsel presented in his

penalty-phase closing argument a grim description of life in prison in order to counter the prosecutor's positive characterization of life in prison. Defense counsel argued:

> Mr. Benito tells you life in prison ain't that bad. The number one cause of death in [the] Florida State Prison system is suicide, so if it ain't that bad, there are a lot of men who are obviously making terrible mistakes.
> It's a world of reinforced concrete, and steel, and steel doors, and coils of razor wire, and electric fences, and machine guns, and shotguns. Mr. Benito says he'll make friends and be able to enjoy sports. He will spend the rest of his life with men who society has found their presence so abhorred that they have to be locked away. Paul Brown will most likely get out of prison when he dies.... He is going to die. We all have to die. His life has been garbage. If he spends the rest of his life in prison, the rest of his life is going to be garbage, too, but it will be life.
> If Judge Spicola sentences him to life in prison, he will spend life in prison. He's not going to harm another innocent person, again.

Brown, 755 So.2d at 624-625. The Florida Supreme Court agreed with trial counsel's testimony at the evidentiary hearing that he had capitalized upon the complained-of closing argument in presenting his own argument for a sentence of life in prison.[9]

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[9] The Florida Supreme Court has held that prosecutors should not argue prison conditions to support a recommendation of death but these holdings were in the context of arguing against a life sentence, not in the context of cross examination of inmates that the defense presented as mitigation. *Taylor v. State*, 583 So.2d 323, 329 (Fla.1991); *Jackson v. State*, 522 So.2d 802, 809 (Fla.1988). In *Hodges*, the prosecutor stated:

> What about life imprisonment? What can a person do in jail for life? You can cry. You can read. You can watch T.V. You can listen to the radio. You can talk to people. In short, you are alive. People want to live. You are living. All right? If [the victim] had had a choice between spending life in prison or lying on that pavement in her own blood, what choice would [she] have made? But, you see, [she] didn't have that choice. Now why? Because George Michael Hodges decided for himself, for himself, that [she] should die.

Hodges v. State, 885 So.2d 338, 367 (Fla. 2004)(Pariente, J., dissenting). The majority rejected a claim of ineffectiveness

Here, as in *Brown*, there was no deficient performance or prejudice. Both sides presented their respective views of life in prison. Moreover, the trial court found the inmates' testimony as a mitigator. The trial court properly denied this claim following an evidentiary hearing.

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based on their prior ruling in the direct appeal finding that the comments were harmless error. *Hodges v. State*, 885 So.2d 338 (Fla.2004).

ISSUE XI

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO PRESENT ADDITIONAL LAY MITIGATION WITNESS AT THE PENALTY PHASE?

Belcher asserts that trial counsel was ineffective for failing to call several mitigation lay witnesses in the penalty phase. IB at 60. There was no deficient performance. Trial counsel interviewed most to the witness presented at evidentiary hearing by collateral counsel but decided not to present them because they were not goo witnesses. This is a reasonable strategic decision. There was no prejudice. Defense counsel presented eleven witnesses during the penalty phase, including Belcher's mother, his sister, and two aunts. Counsel presented family mitigation. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

Penalty phase

Defense counsel presented eleven witnesses during the penalty phase. Belcher's mother, Earline Floyd, his sister, Lashawn Cason, and two aunts, Betty Burney & Priscilla Jenkins, testified. (T. XX 1559-1589,1599-1611; 1589-1599; 1612-XXI 1627). Stephanie Cook, who was a literacy coordinator at Appalachee Correctional Institution testified that Belcher was her educational aide and encouraged other inmates to participate. (T. XXI 1627-1663). Laura Flowers, who employed at the Duval County Jail, testified that Belcher was not a discipline problem. (T. XXI 1664-1666). Five inmates or former inmates, Robert Hiers, Michael Suggs, Alfonzo Smalls, Dwayne Hayes and Destin Turner, testified that Belcher

helped them in various ways, such as being a tutor and coach while they were in prison. (T. XXI 1666-1762). Belcher waived the right to testify at the penalty phase. (T. XXI 1765-1766).

At the *Spencer* hearing trial counsel presented three letters. The second letter was from Belcher's father pleading for mercy. (IV 608). The third letter was from Belcher's grandmother asserting that the defendant was getting his life on track. (R. IV 609).

Waiver

As to Deas, the subclaim as to this particular witness was waived at the evidentiary hearing. (EH April at 69; EH May at 55). Belcher's own pleading establishes that this witness was not available to testify. The witness who "declined to testify to avoid opening old wounds in the family" was not available and did not want to testify at trial. A witness must be available to testify to establish ineffectiveness. *Nelson v. State,* 875 So.2d 579, 583 (Fla. 2004)(noting if a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness).

Evidentiary hearing

Postconviction counsel called Wanda Reddick who was the sister of Belcher's fiancee. (EH April 18). Her sister and Belcher had a son. Wanda Reddick testified that Belcher was a father figure to he sister other children who would coach the boys. This was eighteen years ago. (EH April 21). She was not familiar with the

facts of this crime or the prior crimes. (EH April 23). She testified that the facts would not be a factor in her opinion about Belcher being a good role model. She was not know that Belcher was incarcerated in September of 1987 for 15 months. (EH April 23).

Postconviction counsel called Dedrick Baker, who was a one of the sons of her sister that Wanda Reddick referred to, who testified that Belcher was like a father. (EH April at 26-27). Mr. Belcher was a role model to him who helped him develop a work ethic. This was in 1984 or so. Due to Mr. Belcher incarcerations, Dedrick did not see him for substantial periods of time (EH April at 33).

Postconviction counsel called James Belcher, Sr., who is the defendant's father to testify. (EH April at 35). He and Belcher's mother separated when Belcher was five or six. (EH April at 37). Belcher remained with his mother in the projects. (EH April at 39). The project was one of the worst in Brooklyn. Belcher helped his grandmother with the grocery shopping when he moved to Jacksonville. (EH April at 40). He was not mean or hurtful towards people. (EH April at 42). Mr. Belcher was not aware of his son's prior convictions. (EH April at 45). The prosecutor noted that Belcher was convicted of aggravated assault in 1988 and got three years; Belcher was convicted in 1993 and got three years and was then convicted in 1996 and got 20 years. (EH April at 45).

Postconviction counsel called Bernice Johnson, who is the defendant's aunt, to testify. (EH April at 48). He never got into trouble when he lived with her only when he lived with his mother.

(EH April at 49,51). She testified that he was a loving caring child. (EH April at 51).

Postconviction counsel called Harriet Jarrett, who is the defendant's aunt to testify. (EH April at 55). Belcher was like a big brother to her children. (EH April at 57). He was loving and kind.

Postconviction counsel called Helen Deas, who is the defendant's aunt to testify. (EH April at 59). Belcher was a good influence. (EH April at 62). He loved the Lord. (EH April at 63). She did NOT agree that people should be held accountable for their actions. (EH April at 66). They should NOT suffer the consequences. (EH April at 67). She was not aware of Belcher's prior convictions. The facts of the prior violent crimes would not change her opinion of Belcher as a good role model. When the prosecutor explained the facts of one of the prior crimes, which involved the assault of a woman at gunpoint in her home, Ms. Deas testified that this would not change her opinion. (EH April at 67). The conviction in 1976 for robbing a woman and the conviction in 1981 for attempted robbery also would not change her opinion. (EH April at 67).

Trial counsel Alan Chipperfield, referring to his trial file, testified that the decided that Mr. Belcher , Sr. would not be a good witness. (EH May at 23). After talking with Mr. Belcher on four occasions, he noted at the top of his notes "don't use." (EH May at 23-24). Mr. Belcher was "unrealistic" and did not know a lot about his son's life. (EH May at 24). Trial counsel Alan Chipperfield contacted Harriet Jarrett and received a lot of family history from her but she did not know about Belcher later

involvement in crime. (EH May at 25). Trial counsel Alan Chipperfield contacted Helen Deas but decided that she was not a good witness because she was not realistic about the defendant's record. (EH may at 26). Trial counsel Alan Chipperfield contacted Bernice Johnson but decided that she was not a good witness. (EH May at 26). Lewis testified that Mr. Chipperfield handled most of the penalty phase. (EH May at 46). However, he remember that a sister of a lady that Belcher had lived with know a lot of good things but she knew a lot of things that could hurt too. (EH May at 47). Mr. Belcher did not want some of his family involved in this. (EH May at 49).

The trial court's ruling

> In ground eleven, Defendant claims ineffective assistance of counsel for failing to call Harriet Jarrett, Michael Deas, Helen Deas, Bernice Johnson, Wanda Reddick, Dedrick Baker, and James Belcher, Sr., as mitigation witnesses at the penalty phase of the trial. Initially, the Court notes that at the conclusion of the evidentiary hearing held on May 6, 2005, Defendant abandoned his allegation that counsel failed to call Michael Deas as a mitigation witness. (Exhibit "B," page 55). At the April 27, 2005, evidentiary hearing, Defendant presented the testimony of Wanda Reddick, Dedrick Baker, James Belcher, Sr., Bernice Johnson, Harriet Jarrett, and Helen Deas as mitigation witnesses counsel should have presented during Defendant's penalty phase. (Exhibit "A," pages 18-25, 26-35, 35-48, 49-54, 55-58, 59-68).
>
> Mr. Chipperfield and Mr. Buzzell testified at the May 6, 2005, evidentiary hearing regarding the instant claim. Mr. Chipperfield testified that based on his conversation with Aretha Jones, Dedrick Baker's mother, he determined that Mr. Baker would not be a good defense witness, but conceded that he did not have any notes indicating that he had spoke to Mr. Baker. (Exhibit "B," page 22). Mr. Chipperfield testified that his notes do not reflect that he ever discussed Wanda Reddick with Ms. Jones or that he was ever even aware of Ms. Reddick as her name is not anywhere in his file. (Exhibit "B," pages 22-23). Mr. Chipperfield testified that he believes he spoke to Mr. Belcher, Sr., twice and based on those discussions he decided that Mr. Belcher, Sr., would not

have been a good witness. (Exhibit "B," pages 23-24). Mr. Chipperfield testified that he spoke to Harriet Jarrett and that it was apparent that she did not know about Defendant's involvement in crimes and things like that. (Exhibit "B," page 25). Mr. Chipperfield testified that he spoke to Helen Deas and based on his conversation with her he wrote in his notes "not a good witness." (Exhibit "B," page 26). Finally, Mr. Chipperfield testified that he spoke to Bernice Johnson and he noted that she was "no help" which meant he decided not to call her as a defense witness. (Exhibit "B," page 26).

Mr. Buzzell testified that Mr. Chipperfield handled most of contacting potential mitigation witnesses and deciding who to call. (Exhibit "B," page 46). Mr. Buzzell testified that he recalled counsel talking to a number of Defendant's family members who lived in New York. (Exhibit "B," page 46). Mr. Buzzell testified that some of the family members contacted were not called as defense witnesses because they had information about Defendant's background that would have been harmful to Defendant's case. (Exhibit "B," pages 48-49). Finally, Mr. Buzzell testified that Defendant did not want some of his family to be intimately involved in his case. (Exhibit "B," page 49).

The Court specifically finds Mr. Chipperfield's and Mr. Buzzell's testimony was both more credible and more persuasive than Defendant's allegations. Laramore v. State, 699 So.2d 846 (Fla. 4th DCA 1997). The Court accepts Mr. Chipperfield's explanation as to why these individuals were not called as defense witnesses. The Court finds that their testimony would have been cumulative to the testimony actually presented during the penalty phase. See Brown v. State, 894 So.2d 137 (Fla. 2004); Gudinas v. State, 816 So.2d 1095, 1106 (Fla. 2002) (finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented in mitigation). Further, the Court finds that defense counsel's estimation of these witnesses was accurate in regard to whether or not they provided any assistance to Defendant. See Hamilton v. State, 875 So.2d 586 (Fla. 2004). Accordingly, Defendant has failed to establish error no the part of counsel or prejudice to his case. Strickland, 466 U.S. 668.

Merits

Counsel does not have to interview everyone that might have some mitigating evidence, does not have to call every mitigating witness available and does not have to present every type of mitigating evidence available. Rather, counsel may properly limit his

investigation of mitigating evidence, may properly limit the number of witnesses he presents and may properly decline to present a particular type of mitigating evidence. Defense counsel is not required to present every available mitigation witness to be considered effective. *Bell v. Cone*, 535 U.S. 685, 697-98, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002)(finding no ineffectiveness where defense counsel presented no mitigating evidence in the penalty phase).

There was no deficient performance. Trial counsel interviewed most of these witnesses and decided that they were not good witnesses. Many were not familiar the defendant's criminal history and were impeachable on that basis. They were, in trial counsel word's, "unrealistic" about the defendant's criminal past. Trial counsel reasonably and understandably chose not to present witnesses who incredibly insisted that the defendant was a good role model in the face of Belcher's repeated convictions and incarcerations. This is sound trial strategy. The soundness of these decisions can be seen from the mirth during the cross examination of Helen Deas in the courtroom at the evidentiary hearing. Deas testified that no amount of facts would change her opinion that Belcher was a good role model. No doubt this testimony would have caused mirth from the jury during the penalty phase as well. The trial court expressly found defense counsel's "estimation of these witnesses was accurate."

Furthermore, presenting these witnesses would have opened the door to the defendant's full criminal history. If defense counsel had presented these witnesses to claim that Belcher was a good role

model, the prosecutor could have impeached them with the defendant's extensive criminal record, including his nonviolent offenses, not merely the prior violent crime used as an aggravator, just as the prosecutor did at the evidentiary hearing. The defendant's full criminal record would have been the price of presenting these incredible witnesses. Choosing not to present these witnesses was a reasonable tactical decision.

There is no prejudice. Belcher's family history was presented at the penalty phase via his mother, his sister and his two aunts. As the trial court found, this mitigation evidence was cumulative to the mitigation evidence actually presented by defense counsel at the penalty phase. *Brown v. State*, 894 So.2d 137, 148 (Fla. 2004)(finding no prejudice where much of this testimony simply corroborated the background information presented at the penalty phase through Brown's mother and Dr. Dee because the additional testimony presented at the evidentiary hearing contributes virtually no new information and is merely cumulative to the testimony presented at trial citing *Gudinas v. State*, 816 So.2d 1095, 1106 (Fla. 2002)(finding that trial counsel was not ineffective for failing to present evidence in mitigation that was cumulative to evidence already presented)).

There was no deficient performance nor prejudice from failing to present Belcher's father at the penalty phase. Belcher's father testimony was presented via his letter at the *Spencer* hearing. (EH May at 24). The substance of his testimony was presented via other family members that the penalty phase. The trial court properly denied the claim following an evidentiary hearing.

ISSUE XII

WHETHER THE TRIAL COURT PROPERLY FOUND NO CUMULATIVE ERROR?

Belcher asserts that the trial court improperly found that there was no cumulative error in this case. IB at 71.[10] There was no error and, hence, no cumulative error. The trial court properly denied the claim of cumulative error.

The trial court's ruling

> In Defendant's fourteenth claim, he claims that the cumulative errors of defense counsel raised in the above claims deprived Defendant of his rights to effective assistance of counsel and to a fair trial. As this Court has found the allegations in the above grounds to be without merit, this Court finds that there is no cumulative effect and the instant claim is without merit.

Merits

There was no error and, hence, no cumulative error. *Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003)("[W]here individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail."); *Vining v. State*, 827 So.2d 201, 219 (Fla. 2002)(concluding that because "the alleged individual errors are without merit, the contention of cumulative error is similarly without merit"); *Downs v. State*, 740 So.2d 506, 509 n. 5 (Fla. 1999)(finding that claim of cumulative error was without merit where the court found the individual claims to be without merit). The trial court properly denied this claim of cumulative error.

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[10] Appellate counsel designates this as ISSUE 14; however, there is no issue 12 or 13. The State will designate the issue as ISSUE XII.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of postconviction relief following an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Christopher J. Anderson, 645 Mayport Road, Suite 4-G, Atlantic Beach, FL 32233 this 4th day of August, 2006.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

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

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