IN THE FLORIDA SUPREME COURT
CASE NO. SC06-866

JAMES BELCHER, *Petitioner*

v.

JAMES R. MCDONOUGH, *Respondent*.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, James R. McDonough, by and through undersigned counsel and responds as follows to the petition for writ of habeas corpus. For the reasons discussed, the petition should be denied.

FACTS AND PROCEDURAL HISTORY

The facts of the case and its procedural history are recited in the accompanying answer brief. Belcher was represented in the direct appeal by Assistant Public Defender W.C. McLain. He wrote a 50 page initial brief raising four issues: (1) whether the trial court abused its discretion by denying a motion for mistrial made when the prosecutor argued, in the closing argument of the penalty phase, that Belcher killed the victim to eliminate her as a witness; (2) whether the trial court abused its discretion in finding the homicide to be HAC; (3) whether the trial court abused

its discretion by giving the standard instruction on mitigating circumstances and refusing to give a special instruction on mitigating circumstances; and (4) whether *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), applies to capital cases. *Belcher v. State*, 851 So.2d 678 (Fla. 2003). Appellate counsel then wrote a reply brief further addressing the *Apprendi* issue. Appellate counsel, at the oral argument, focused on the first issue. This Court basically found error regarding the first issue raised by appellate counsel but held the error was harmless. *Belcher*, 851 So.2d at 682-683 (concluding that "although the prosecutor arguably crossed the line into discussion of matters that could also support the avoid arrest aggravator, which was not a relevant aggravator to this case, we find that any resulting error was harmless."). Appellate counsel was admitted to the Florida Bar in 1975.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

This Court noted that a habeas petition is the proper vehicle to assert ineffective assistance of appellate counsel. *Davis v. State*, 928 So.2d 1089, 1126 (Fla. 2005)(citing *Rutherford v. Moore*, 774 So.2d 637, 643 (Fla. 2000) and *Thompson v. State*, 759 So.2d 650, 660 (Fla. 2000)). In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court explained that the standard for proving ineffective assistance of appellate counsel mirrors the standard

for proving ineffective assistance of trial counsel established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The *Rutherford* Court explained that to show prejudice petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. *Rutherford*, 774 So.2d at 643. Appellate counsel's performance will not be deficient if the legal issue that appellate counsel failed to raise was meritless. *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.) Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. *Thompson v. State*, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing *Cave v. State*, 476 So.2d 180, 183 n. 1 (Fla. 1985)). Additionally, in the appellate context, the prejudice prong of *Strickland* requires a showing that the appellate court would have afforded relief on appeal. *United States v. Phillips*, 210 F.3d 345, 350 (5th Cir. 2000). Petitioner must show that he would have won a reversal from this Court had the issue been raised.

The standard of review of an ineffectiveness claim is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1034 (Fla. 1999); *Holladay v. Haley*, 209 F.3d 1243, 1247 (11th Cir. 2000).

ISSUE I

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE AN *APPRENDI V. NEW JERSEY*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) CLAIM?

Belcher contends that appellate counsel was ineffective for failing to raise a constitutional challenge to Florida's death penalty statute based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).[1] Appellate counsel was not ineffective. Appellate counsel did raise an *Apprendi* claim in the direct appeal. *Belcher*, 851 So.2d 685 (rejecting a Sixth Amendment challenge to Florida's statute based on *Apprendi* and *Ring* including an argument that the jury's nonbinding recommendation was not unanimous.). Appellate counsel raised this challenge prior to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The initial brief was filed on March 21, 2002, several months prior to the *Ring* decision being issued on June 24, 2002. Appellate counsel is not required to be clairvoyant to be effective, but appellate counsel in this case was, in fact, clairvoyant regarding this issue. *Johnson v. State*, 921 So.2d 490, 506 (Fla. 2005)(observing that "[t]his Court

[1] If Belcher is raising a straight *Ring* claim, rather than an ineffective assistance of appellate counsel claim, then it is barred by the law of the case doctrine. This Court already addressed a *Ring* challenge to Belcher's death sentence in the direct appeal. *Belcher*, 851 So.2d 685 (rejecting a Sixth Amendment challenge to Florida's statute based on *Apprendi* and *Ring*.). He may not relitigate the same claim raised in the direct appeal in his postconviction appeal.

has consistently held that trial and appellate counsel cannot be held ineffective for failing to anticipate changes in the law." citing *Nelms v. State*, 596 So.2d 441, 442 (Fla. 1992) and *Stevens v. State*, 552 So.2d 1082, 1085 (Fla. 1989)); *United States v. Ardley*, 273 F.3d 991, 993 (11th Cir. 2001)(Carnes, J., concurring)(observing that "[i]n this circuit, we have a wall of binding precedent that shuts out any contention that an attorney's failure to anticipate a change in the law constitutes ineffective assistance of counsel" and collecting cases); *Thompson v. Wainwright*, 787 F.2d 1447, 1459 n. 8 (11th Cir. 1986) ("defendants are not entitled to an attorney capable of foreseeing the future development of constitutional law"); *Cooks v. United States*, 461 F.2d 530, 532 (5th Cir. 1972) ("Clairvoyance is not a required attribute of effective representation."); *Rowe v. State*, 523 So.2d 620, 623 (Fla. 2d DCA 1988)(concluding that counsel not ineffective for lack of "clairvoyance" regarding the *Whitehead* issue). While appellate counsel foresaw *Ring*, Belcher faults him for not foreseeing the dicta in *State v. Steele*, 921 So.2d 538 (Fla. 2005), urging the Legislature to require unanimity as well. But appellate counsel did foresee this development as well. Appellate counsel argued that jury recommendations of death should be unanimous both in the issue statement and in the body of the argument. (IB in direct appeal at 49). Of course, appellate counsel did not cite *Steele* in support of his argument because that literally would be

impossible.

Nor is there any prejudice. In *Steele*, the Florida Supreme Court explained that, even if *Ring* applied in Florida, it would require only that the jury make a finding that at least one aggravator exists. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. *Steele*, 921 So.2d at 546. The *Steele* Court relied on *Jones v. United States*, 526 U.S. 227, 250-251, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), in which the United States Supreme Court explained that in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." So, according to the Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator, which is all *Ring* requires. Under the logic of *Steele* and *Jones*, Belcher's death sentence would still comply with *Ring* because the jury in this case found an aggravator. *Belcher*, 851 So.2d 685 (rejecting a *Ring* challenge because "two of the three aggravators found in this case are exempted from an *Apprendi* analysis: prior violent felony and murder committed in the course of a sexual battery."). Even under the logic of *Steele*,

Belcher's death sentence is still valid.[2] Moreover, while the *Steele* Court urged the Florida Legislature to amend the death penalty statute to require that the jury's death recommendation be unanimous, admonishments to the Legislature from the courts are not controlling precedent. The statute has not been amended to date. Even after *Steele*, unanimity is not required under Florida's death penalty statute.[3] Appellate counsel was highly effective.

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[2] Belcher contends that "it is impossible to know whether the jurors would have unanimously found any specific aggravating circumstances." Habeas petition at 12. This is simply not so. We do know that this jury did, in fact, find one of the three aggravators unanimously by convicting Belcher of sexual battery in the guilt phase unanimously. The jury also convicted Belcher of sexual battery as charged in Count II. (R. III 460). This jury necessarily found the murder committed in the course of sexual battery aggravator unanimously by their verdict in the guilt phase. Indeed, this was part of this Court's logic in rejecting Belcher's *Ring* claim in the direct appeal. *Belcher*, 851 So.2d at 685 (stating: "Regarding the murder being committed in the course of a sexual battery aggravator, the fact remains that a unanimous jury found Belcher guilty of both murder and sexual battery, and therefore the guilt phase verdicts reflect that the jury independently found the aggravator of the murder being committed in the course of a sexual battery."). Moreover, the prior juries in the prior convictions had also found Belcher guilty unanimously of those crimes. Two of the three aggravators were found unanimously by juries.

[3] Belcher asserts that "unanimous, twelve person verdicts are required to impose the death penalty under common law principles" and cites *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979) in support of this assertion. *Burch* did not hold that "unanimous, twelve person verdicts are required" constitutionally - far from it - *Burch* held that six person juries must be unanimous. The United States Supreme Court has held that a six-person jury is constitutional. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Nor is unanimity required with twelve person juries. *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(upholding a conviction where 9 out of 12 jurors voted to convict in an armed robbery

ISSUE II

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF GRUESOME PHOTOGRAPHS?

Belcher argues that his appellate counsel was ineffective for failing to raise the issue of the admissibility of photographs of the crime scene and the victim's body. 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 exhibit any "strong emotional response". (T. XIII 591-592).

During the guilt phase, Officer O'Bryant, who is an evidence technician with the Jacksonville Sheriff's Office, who assisted

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case); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972)(upholding a state statute providing that only 10 members of a 12-person jury need concur to render a verdict in noncapital cases). The United States Supreme Court has never addressed unanimity in a capital case. So, contrary to this assertion, there is no constitutional requirement of unanimous, twelve person verdicts.

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).

Appellate counsel was not ineffective. First, gruesome photographs issues are not winners. Appellate counsel is not ineffective for failing to raise an issue that traditionally has had little success with this Court. While the issue is often raised when a victim is mutilated, the body is decomposed or the damage to the body occurred after the murder, it is rarely successful even in such cases. *England v. State*, 2006 WL 1472909, *6-*7 (Fla. 2006)(raising issue of gruesome photographs in a case were due to the passage of time between the crime and the discovery of the body, these photographs reveal the victim's body in a state of moderate decomposition with bloating and with insect larvae on the wounds but holding all the photographs were relevant and none were so shocking as to defeat the value of their relevance); *Boyd v. State*, 910 So.2d 167, 192 (Fla. 2005)(affirming the admission of a "somewhat gruesome" photograph where decomposition of the body had begun, resulting in the victim's eyes bulging significantly and fragments of the brain were visible because this photograph was the only depiction of the manner of death, assisted the medical examiner in his testimony, and was relevant to the HAC aggravating factor and explaining that even gruesome photographs are

admissible); *Harris v. State*, 843 So.2d 856, 865 (Fla. 2003)(concluding that the admission of crime scene photographs of the decomposed body of the victim with visible maggots and 8 minute videotape was proper because they were relevant to demonstrate the manner of death and assisted the officer's testimony about the crime scene); *Looney v. State*, 803 So.2d 656, 668-669 (Fla. 2001)(finding photographs which depicted the "charred bodies" of the victims and were "undeniably" gruesome relevant to assist the crime scene technician in explaining the condition of the crime scene when the police arrived but finding autopsy photographs were not admissible because damage to the bodies from the fire occurred after the victims were dead but concluding the error was harmless).

In *Douglas v. State*, 878 So.2d 1246, 1255 (Fla. 2004), this Court held that a one 14-by 17-inch color photograph depicting the body as it was found at the crime scene and thirteen 8-by 10-inch autopsy photographs were properly admitted. The victim's body was nude from the waist down, except for her black socks and her top and black bra were torn and pushed up to her shoulders, exposing her breasts. *Douglas*, 878 So.2d at 1251. This Court noted that the test for admissibility of photographic evidence is relevancy rather than necessity." *Douglas*, 878 So.2d at 1255 citing *Pope v. State*, 679 So.2d 710, 713 (Fla. 1996). Dr. Matthew Areford, the associate medical examiner, went to the scene and performed the autopsy. On appeal, Douglas argued that these photographs had little, if any,

relevancy and that their probative value was outweighed by their prejudicial effect. This Court explained that crime scene photographs are considered relevant when they establish the manner in which the murder was committed, show the position and location of the victim when he or she is found by police, or assist crime scene technicians in explaining the condition of the crime scene when police arrived. *Id. citing Looney v. State*, 803 So.2d 656, 669-70 (Fla. 2001). The *Douglas* Court also explained that autopsy photographs are admissible when they are necessary to explain a medical examiner's testimony, the manner of death, or the location of the wounds. The *Douglas* Court explained that even where photographs are relevant, the trial court must still determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jurors and distract them from a fair and unimpassioned consideration of the evidence. The *Douglas* Court noted that less graphic photos should be used if available. The *Douglas* Court reasoned that the single photograph of the victim, as she was found at the crime scene, was relevant to show how the body appeared at the time the police and Dr. Areford arrived on the scene. The *Douglas* Court reasoned that in fact, Dr. Areford referred to this photograph when explaining his initial impressions and assessment of the injuries sustained by the victim. Because the crime scene photograph accurately depicted how the victim was found at the crime scene, the Court found the photograph

was admissible. The *Douglas* Court concluded that the trial court did not abuse its discretion in admitting the photographs because they were relevant and not so inflammatory as to create undue prejudice in the minds of the jurors. Basically, as is clear from *England*, *Boyd*, *Harris*, *Looney* and *Douglas*, gruesome photographs issues on appeal rarely result in new trials.

Moreover, this case was not suited to raising such an issue. These photographs were not particularly gruesome. The victim was found murdered inside her house and her body was discovered relatively quickly. The crime occurred on January 8th or 9th, and her brother discovered her body on January 9, when he went to her home around 9 p.m. to check on her because she had missed school and work that day. Basically, she was discovered within a day, at most, of being murdered. Her brother testified that rigor mortis had set in but he did not testify to any damage to the body. Her body was not decomposed. Because the body was inside, no animals harmed the body. The autopsy was performed on January 10 at 10:00 am which was approximately 12 hours after the body was discovered. Collateral counsel offers no argument as to why he considers these particular photographs in this particular case to be "so shocking that the risk of prejudice outweighs relevancy." Petition at 13. Collateral counsel seems to be arguing that any and all photographs of the victim, where defense counsel admits the victim is dead, are not admissible. There is no caselaw support for this position.

Moreover, the issue is meritless because the photographs were admissible. The location of this crime mattered particularly in this case because the victim of the prior violent felony used as aggravator, which the trial court found to be eeriely similar to this murder, was also attacked in the bathroom. (T. XXII 1871). Belcher made the prior victim, Wanda White, go into the bathroom at gun point. (T. XX 1528). While the fact the victim was dead was not disputed, the identity of the perpetrator was disputed by the defense. So, photographs of the victim in the bathroom were highly relevant. The State is the one party who has a beyond a reasonable doubt standard of proof. The State needs "evidentiary value and depth" in its case to met this standard of proof. *Brown v. State*, 719 So.2d 882, 887 (Fla. 1998). These photographs were necessary, relevant, not particularly gruesome, and therefore, admissible.

Appellate counsel was not ineffective for recognizing that gruesome photograph issues rarely succeed and for knowing the caselaw in this area was not favorable. Appellate counsel had two additional hurdles as well - the standard of review and the harmless error doctrine. The standard of review for the admissibility of photographs is abuse of discretion. *Douglas v. State*, 878 So.2d 1246, 1255 (Fla. 2004)(holding that the trial court did not abuse its discretion by admitting color photograph that depicted victim's body as it was found at the crime scene and stating this court reviews the admission of photographic evidence

for an abuse of discretion citing *Philmore v. State*, 820 So.2d 919, 931 (Fla. 2002)). The abuse of discretion standard of review is one of the most difficult for an appellant to satisfy. *Ford v. Ford*, 700 So.2d 191, 195 (Fla. 4th DCA 1997). Appellate counsel is not ineffective for recognizing this unfavorable standard of review. *Armstrong v. State*, 862 So.2d 705, 720 (Fla. 2003)(rejecting an ineffective assistance of appellate counsel claim where appellate counsel would have faced two very high standards of review). And even when this Court finds such photographs to be inadmissible, it often finds their admission to be harmless error. *Looney v. State*, 803 So.2d 656, 668-669 (Fla. 2001)(finding photographs which depicted the "charred bodies" of the victims and were "undeniably" gruesome relevant to assist the crime scene technician in explaining the condition of the crime scene when the police arrived but finding autopsy photograph not admissible because damage to the bodies from the fire occurred after the victims were dead but concluding the error was harmless); *Duncan v. State*, 619 So.2d 279, 283 (Fla. 1993)(finding that the prejudicial effect of a gruesome photograph clearly outweighed its probative value where the photograph depicted extensive injuries suffered by the victim of a totally unrelated crime but finding the error harmless). Appellate counsel would have to overcome an unfavorable standard of review and a harmless error analysis.

Appellate counsel was not ineffective. *Zack v. State*, 911

So.2d 1190, 1209-1210 (Fla. 2005)(concluding that appellate counsel was not ineffective for failing to raise this nonmeritorious issue of gruesome photographs on appeal); *Rodriguez v. State*, 919 So.2d 1252, 1286 (Fla. 2005)(concluding that appellate counsel's failure to raise the issue of the admission of the one autopsy photograph was not ineffective assistance); *Orme v. State*, 896 So.2d 725, 740 (Fla. 2005)(concluding that appellate counsel was not ineffective for failing to raise the preserved issue of the admission of forty-three gruesome photographs). Appellate counsel was not ineffective.

ISSUE III

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE DENIAL OF HIS MOTION FOR JUDGMENT OF ACQUITTAL?

Belcher asserts that his appellate counsel was ineffective for failing to raise the denial of his motion for judgment of acquittal and the trial court failing to give a special jury instruction on circumstantial evidence. Belcher asserts that this is a wholly circumstantial evidence case and his reasonable hypothesis of innocence is that the victim had sex with another man, maybe Michael Randall, prior to her death and/or that he and the victim had consensual sex.

In *Reynolds v. State*, - So.2d -, 2006 WL 1381880, *12-13 (Fla. May 18, 2006), this Court held that a case involving DNA is not a wholly circumstantial evidence case and the special standard applicable to entirely circumstantial evidence cases does not apply. Reynolds asserts that the evidence of his guilt offered by the State in this case was entirely circumstantial and, therefore, the heightened standard of review should apply. Reynolds contended that the case against him rests solely on the evidence that his finger was injured and "tainted and inconsistent DNA evidence." Contrary to this assertion, this Court found additional evidence including that Reynolds denied ever being in the victims' residence -a statement that was clearly inconsistent with the considerable DNA evidence presented at trial which placed him inside the trailer

This Court found that the evidence was not entirely circumstantial citing *Meyers v. State*, 704 So.2d 1368, 1370 (Fla. 1997)(holding that the case could not be deemed wholly circumstantial where testimony at trial established that the defendant confessed to a former cellmate) and *Orme v. State*, 677 So.2d 258, 261-62 (Fla. 1996)(holding that case involving evidence such as eyewitness testimony placing the defendant at the scene, acknowledgment by the defendant of a dispute with the victim and theft of the victim's purse, and DNA evidence suggesting that the defendant had engaged in sexual relations with the victim could not be deemed entirely circumstantial). Because the evidence was not entirely circumstantial, this Court did not apply the special standard of review applicable to cases based solely on circumstantial evidence citing *Fitzpatrick v. State*, 900 So.2d 495, 506 (Fla. 2005)(stating: "this Court need not apply the special standard of review applicable to circumstantial evidence cases because the State presented direct evidence in the form of DNA evidence and eyewitness testimony."). This Court then concluded that the motion for acquittal was properly denied because the "significant DNA evidence" was sufficient. *Reynolds*, - So.2d -, 2006 WL 1381880 at *12-13.[4]

[4] Of course, in the age of DNA, the distinction between direct and circumstantial evidence is unwarranted. The distinction developed at common law when direct evidence cases were the strong cases and circumstantial cases were the weak cases. This caused courts to treat the two types of evidence differently and develop

While *Reynolds* was not available to appellate counsel at the time he filed the initial brief in 2002, *Orme*, which was decided in 1996, was available. Appellate counsel would have known that a DNA case where the defendant lied about knowing the victim and lied about ever being in her house, would not be viewed by this Court as

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the rule that circumstantial evidence must exclude any hypothesis of innocence. William Wills, An Essay on the Principles of Circumstantial Evidence 171 (Philadelphia, T. & J.W. Johnson, 1853). Due to scientific advances, these days, circumstantial evidence cases are the strongest cases. Both DNA and fingerprints are considered circumstantial evidence. *Bedoya v. State*, 779 So.2d 574, 577 (Fla. 5th DCA 2001)(noting that fingerprint and DNA evidence are generally considered a species of circumstantial evidence). Circumstantial evidence cases involving either DNA or fingerprints are now the strongest cases. John Henry Wigmore, 2 Evidence in Trials at Common Law s 414, at 483 (1979) (arguing that, according to scientific principles, fingerprints have the highest degree of certainty); *People v. Wesley*, 140 Misc.2d 306, 533 N.Y.S.2d 643, 644 (N.Y.Sup.Ct. 1988)(observing that DNA evidence has been called the "single greatest advance in the search for the truth . . . since the advent of cross-examination.").

The United States Supreme Court abolished the common law distinction between direct and circumstantial evidence cases in *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954). Most states have abolished the distinction as well. Cf. *State v. Adcock*, 310 S.E.2d 587, 602-08 (N.C. 1983); *State v. Jenks*, 574 N.E.2d 492, 496-503 (Ohio 1991); *State v. Gosby*, 539 P.2d 680, 684-86 (Wash. 1975). Florida, has abandoned giving any jury instruction based on the distinction but inexplicably has retained the distinction in the sufficiency of the evidence analysis. *In re: Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases*, 431 So. 2d 594, 595 (Fla. 1981). The rule requiring the State to rebut the defendant's reasonable hypothesis should not apply to cases where there is DNA or fingerprint evidence. Quite simply, DNA beats an eyewitness. There is no logic in requiring the State to rebut a hypothesis of innocence in a case with DNA results of one in two trillion but not requiring the State to rebut any hypothesis where there is an eyewitness. This court should retain the special test for sufficiency only in circumstantial evidence cases that do not involve fingerprints or DNA.

a wholly or entirely circumstantial evidence case and he would have known that, under existing caselaw, the lower standard of the competent, substantial evidence test, which does not require the State to rebut the defendant's hypothesis of innocence, would be applied to any judgment of acquittal issue he raised. The DNA evidence itself is sufficient to meet this test. Belcher's DNA was found on the victim's green slippers located just outside the bathtub where the victim's body was found. Using the FBI African-American database, "one in two trillion males" has the same DNA profile as Belcher. (T. XVII 1134). This figure is the population of the planet several times over. Basically, the DNA is competent, substantial evidence that Belcher was the perpetrator of both the murder and the sexual battery. *Roberson v. State*, 16 S.W.3d 156, 169 (Tx. App. Ct. 2000)(holding testimony of even one DNA expert that there is a genetic match and the statistical probability that anyone else was the source of that semen are 1 in 500 million is legally sufficient to support a guilty verdict).

Even if viewed as a wholly circumstantial evidence case, the State's evidence rebuts his hypothesis of innocence. The problem with the "reasonable" hypothesis of innocence is that it does not account for Belcher's DNA on the victim's green slippers located just outside the bathtub where the victim's body was found. A reasonable hypothesis of innocence must account for the State's evidence and this one does not.

Furthermore, any hypothesis of innocence that the victim may have had sex with another man earlier is not a hypothesis of innocence because it does not rebut the prosecution's theory. It is a *non sequitur*. The victim may well have dated other men in her life, including Michael Randall, before being murdered and raped by Belcher. While such a theory could explain the victim's vaginal injuries, it does not explain Belcher's DNA on the slipper of a woman, he claimed not to have known and the slipper being outside the bathtub which contained the victim's body in a house he claimed that he had never been inside. Detective Robert Hinson was the lead detective and he interviewed Belcher on August 4, 1998 (T. XV 808, 896). Belcher denied knowing the victim. (T. XV 902). Detective Hinson showed Belcher a photograph of the victim. (T. XV 902). He denied knowing the victim or ever having met her. (T. XV 902). Detective Hinson showed Belcher a photograph of the victim's home and he denied ever being there. (T. XV 903). The Detective showed Belcher two different photographs of the victim. (T. XV 906). Belcher denied ever having sex with the victim. (T. XV 909). Any hypothesis that the victim and Belcher had consensual sex was rebutted by Belcher's own statements denying even knowing her, ever having sex with her or ever being in her house. Her possession of condoms and birth control proves nothing about the perpetrator of this crime. This is a complete *non sequitur*. Appellate counsel was not ineffective.

SPECIAL INSTRUCTION ON CIRCUMSTANTIAL EVIDENCE

Nor was appellate counsel ineffective for failing to raise the issue of the trial court refusal to give a special instruction on circumstantial evidence. This Court eliminated the standard jury instruction on circumstantial evidence twenty-five years ago, finding it unnecessary in light of the required instruction on reasonable doubt. *In re Standard Jury Instructions in Criminal Cases*, 431 So.2d 594, 595 (Fla. 1981). This Court has repeatedly held that trial courts do not abuse their discretion in refusing to give such an instruction. *Parker v. State*, 873 So.2d 270, 294 (Fla. 2004)(rejecting a claim that the trial court abused its discretion in denying his request for a special jury instruction on circumstantial evidence and explaining: "[a]lthough the trial court can give the circumstantial evidence instruction, we have 'expressly approved courts which have exercised their discretion and not given the instruction.'" citing *Monlyn v. State*, 705 So.2d 1, 5 (Fla. 1997)). Appellate counsel is not ineffective for knowing this Court's caselaw regarding such special circumstantial evidence instructions and declining to raise an issue repeatedly rejected by this Court for decades.

Furthermore, as explained above, this case was not a wholly circumstantial evidence case. The main evidence, here, as in *Reynolds* and *Orme*, was DNA. Giving a special instruction on circumstantial evidence in a case that does not involve only

circumstantial evidence would be an abuse of discretion. The first requirement of any jury instruction, special or otherwise, is that it be a correct statement of the law. A circumstantial evidence jury instructions is not a correct statement of the law governing this case. Appellate counsel was not ineffective for recognizing what collateral counsel does not - that this is not a circumstantial evidence case. Appellate counsel was not ineffective.

ISSUE IV

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF THE PROSECUTOR'S ALLEGED COMMENT ON THE RIGHT TO REMAIN SILENT?

Belcher asserts that his appellate counsel was ineffective for failing to raise the issue of prosecutor's comment on his right not to testify. Pet. at 23. Appellate counsel was not ineffective. The prosecutor's comments were an invited response to the defense of consensual sex and the error, if any, was harmless.

First, appellate counsel did raise a prosecutorial comments issue in the direct appeal. Appellate counsel raised an issue that the prosecutor's later comments amounted to an avoid arrest aggravator as his first claim on appeal. This issue was discussed at length at the oral argument in the direct appeal and several Justices found a great deal of merit to the claim and the Court, in its written opinion found that the prosecutor's comment arguably crossed the line. *Belcher*, 851 So.2d at 682-683 (concluding that "although the prosecutor arguably crossed the line into discussion of matters that could also support the avoid arrest aggravator, which was not a relevant aggravator to this case, we find that any resulting error was harmless."). Appellate counsel can certainly limit himself to one prosecutorial comment issue on appeal.

In *Caballero v. State*, 851 So.2d 655, 660 (Fla. 2003), this Court held that a prosecutor's remark about the uncontradicted evidence was not an impermissible comment on the defendant's right

not to testify if the State is rebutting a defense argument. On appeal, Caballero argued that the prosecutor's statement was an impermissible comment on his right to remain silent, and that the prosecutor's statement improperly shifted the burden of proof to the defense. This Court disagreed, reasoning it is permissible for the State to emphasize uncontradicted evidence for the narrow purpose of rebutting a defense argument since the defense has invited the response. The Court explained that the State emphasized the evidence of Caballero's actions for the purpose of countering the defense argument that Caballero did not want to kill O'Neill. The defense's argument invited the State's response.

Here, as in *Caballero*, the prosecutor was merely pointing out the lack of evidence of consensual sex in response to the defense claim of consensual sex. Prosecutors may point out that there is no evidence or testimony to support a defense without commenting on the defendant's failure to testify. Such remarks or comments are not fairly susceptible of being a comment on the defendant's failure to testify. *Ramirez v. State*, 847 So.2d 1147, 1148 (Fla. 3d DCA 2003)(concluding that the State's argument was not fairly susceptible of being a comment on the defendant's failure to testify, or to call witnesses; rather, the argument was phrased permissibly in terms of an absence of testimony from the witness stand where prosecutor remarked in closing about the absence of any evidence that the defendant had the tattoos on the day of the

crime). Moreover, the defense invited this comment, just as the defense did in *Caballero*.

Additionally, it is "well settled" that impermissible comments on a defendant's failure to testify are subject to the harmless error analysis. *Rodriguez v. State*, 753 So.2d 29, 39 (Fla. 2000)(holding prosecutor remark that "there was nothing in the direct or cross examination of any witness who testified that pointed to any other person being involved other than Luis Rodriguez and this defendant" to be improper comments on his constitutional right to remain silent because, while this Court has attempted to draw "a distinction between impermissible comments on silence and permissible comments on the evidence" where the evidence is uncontradicted on a point that only the defendant can contradict, a comment on the failure to contradict the evidence becomes an impermissible comment on the failure of the defendant to testify but noting that . . . "it is well settled that such erroneous comments do not require an automatic reversal" and holding error to be harmless)[5]. The error, here, if any, was

[5] *Rodriguez* does not apply here because of the "narrow exception" to the rule that a comment on the lack of testimony or evidence from the stand is a comment on the right not to testify if the defendant is the only one who could testify as to the facts. *Rodriguez*, 753 So.2d at 38-39. *Rodriguez* lists the narrow exceptions as applicable where the defendant has asserted a defense of alibi, self-defense, or defense of others, relying on facts that could be elicited only from a witness who is not equally available to the State. Consent is like a defense of alibi, self-defense, or defense of others and therefore is part of the narrow exception. The victim was not available to the State to rebut the defense of

harmless. The comment did not relate to the premeditated murder conviction only the felony murder and the sexual battery convictions. Even in relation to the sexual battery conviction, the prosecutor's remark was harmless. Belcher's DNA was found on the slipper of a victim Belcher denied knowing and the medical examiner's opinion was, while it is possible that the victim's injuries were from rough consensual sex, the injuries were more likely a result of rape.

Belcher's reliance on the Second District decision in *Holloman v. State*, 573 So.2d 134 (Fla. 2d DCA 1991), is misplaced. In *Holloman*, the Second District held that the prosecutor's comment during closing argument attacking defendant's failure to testify was error, and the error was not harmless. Holloman was convicted of three counts of delivery of cocaine and three counts of possession of cocaine. The prosecutor twice commented on the defendant's failure to testify during closing argument. The third time, the prosecutor, attempting to persuade the jury that the voice on the tape was appellant's, stated:

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consensual sex because Belcher murdered her.

The invited response exception of *Rodriguez* based on *Dufour v. State*, 495 So.2d 154, 160 (Fla. 1986) and *Barwick v. State*, 660 So.2d 685, 694 (Fla. 1995), applies here as well. Unlike *Rodriguez*, where the prosecutor commented "we still haven't heard in any of the arguments, in any of the discussions, what the theory is of who that second person could have been", here, there was argument and cross attempting to establish a consensual sex defense. Indeed, collateral counsel is reasserting a consensual sex argument in this appeal.

> There was no other female in that house when it was searched. And on that tape, selling that cocaine, was a woman's voice, and there has been no rebuttal, no evidence from that stand to say other than it was the defendant on that tape, or to establish that there was someone, some other female living in that house.

The Second District's decision in *Holloman* was issued years prior to this Court's decisions in *Caballero* and *Rodriguez* and does not reflect their reasoning. Moreover, while this may be the Second District's view, although *Holloman* has not been cited by any Court, including the Second District, since it was decided, it is not the Third District's view. *Ramirez v. State*, 847 So.2d 1147, 1148 (Fla. 3d DCA 2003)(concluding that the State's argument was not fairly susceptible of being a comment on the defendant's failure to testify, or to call witnesses; rather, the argument was phrased permissibly in terms of an absence of testimony from the witness stand where prosecutor remarked in closing about the absence of any evidence that the defendant had the tattoos on the day of the crime).

Appellate counsel's performance was not deficient. He could certainly believe that prosecutor's remarks would not be viewed as error at all, as in *Caballero,* or as fitting within one of the two exceptions discussed in *Rodriguez* and that, even if the Court viewed the comment as error, it would also view it as harmless, as in *Rodriguez*. While *Caballero* was not available to appellate counsel when he wrote the brief, *Rodriguez* was available.

Moreover, *Rodriguez* discussed this Court's existing caselaw, such as *Dufour v. State*, 495 So.2d 154, 160 (Fla. 1986) and *Barwick v. State*, 660 So.2d 685, 694 (Fla. 1995), all of which affirmed similar prosecutorial comments. Moreover, there was no prejudice because the error, if any, was harmless, as explained above. Appellate counsel was not ineffective.

ISSUE V

WHETHER APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE ISSUE OF VICTIM IMPACT EVIDENCE?

Belcher argues that appellate counsel was ineffective for failing to raise the issue of victim impact evidence. Habeas pet. at 27. Appellate counsel was not ineffective. Victim impact evidence is admissible in Florida and appellate counsel is not ineffective for knowing that it is admissible.

The prosecutor repeatedly told the jury that they were not to use the victim impact evidence as aggravation but that they could consider it.[6] Appellate counsel was not ineffective for raising the admissibility of victim impact evidence. Florida has a statute permitting the admission of victim impact evidence. § 921.141(7), Fla. Stat. (1996)(providing: "[s]uch evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death."). The United States Supreme Court, in *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), rejected an argument that admitting such evidence violates the Eighth Amendment. This Court has repeatedly affirmed the admission of victim impact evidence. *Schoenwetter v. State*, -So.2d -, 2006 WL

[6] The victim's supervisor testimony that the victim was a punctual employee was not victim impact testimony. It was admitted to corroborate her brother's testimony that he was concerned about his sister when she did not show up for work that day and to help establish the time of her death.

1096646, *9 (Fla. April 27, 2006)(concluding that the trial court properly admitted the testimonies of the three victim impact witnesses citing *Kormondy v. State*, 845 So.2d 41, 53 (Fla. 2003); *Burns v. State*, 699 So.2d 646, 653 (Fla. 1997)(holding that victim impact evidence is relevant even though it does not address any aggravating circumstance or rebut any mitigating circumstance); *Windom v. State*, 656 So.2d 432, 438 (Fla. 1995)(rejecting a claim that victim impact evidence is essentially non-statutory aggravation).

Contrary to Belcher's claim, even if victim impact evidence is viewed as aggravation, it does not prevent narrowing the class of cases where death is the appropriate penalty. Pet. at 33. The United States Supreme Court, in *Payne*, specifically discussed the narrowing requirement but rejected any constitutional violation.

Appellate counsel is not ineffective for failing to raise an issue where there is a statute providing for the admission of such evidence, controlling precedent from the United States Supreme Court rejecting a constitutional challenge to its admission and a literal string cite of cases from this Court permitting its admission. Thus, appellate counsel was not ineffective.

CONCLUSION

The State respectfully requests that this Honorable Court deny the habeas petition.

Respectfully submitted,
CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing response to petition for writ of habeas corpus has been furnished by U.S. Mail to Christopher 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 point font.

_____
Charmaine M. Millsaps
Attorney for the State of Florida